Supreme Court, U.S.
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No. 05-668

IN THE

Supreme Court of the United States

ED BUSS, in his official capacity as Superintendent of the Indiana State Prison,
Petitioner,

v.

MARK ALLEN WISEHART,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6201

**Counsel of Record*

STEVE CARTER
Attorney General
THOMAS M. FISHER*
Solicitor General
STEPHEN R. CREASON
Section Chief and Deputy
Attorney General

Counsel for Petitioner

CAPITAL CASE

QUESTIONS PRESENTED

1. In jury bias claims, does the Sixth Amendment require a presumption of prejudice that the prosecution must disprove?

2. If so, was this rule "clearly established" by this Court for habeas corpus purposes in light of *Smith v. Phillips*, 455 U.S. 209 (1982), *United States v. Olano*, 507 U.S. 725 (1993), and a well-established circuit conflict over the rule?

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PETITION FOR A WRIT OF CERTIORARI

The State of Indiana, through Superintendent of the Indiana State Prison Ed Buss, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit granting Mark Allen Wisehart a writ of habeas corpus from his convictions and sentence of death.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at *Wisehart v. Davis*, 408 F.3d 321 (7th Cir. 2005), *reh'g and reh'g en banc denied.* The order of the district court (Pet. App. 10a) is unreported. The opinion of the Indiana Supreme Court on Wisehart's petition for state post-conviction relief (Pet. App. 60a) is reported at *Wisehart v. State*, 693 N.E.2d 23 (Ind. 1998), *reh'g denied, cert. denied*, 526 U.S. 1040 (1999). The opinion of the Indiana Supreme Court on Wisehart's direct appeal (Pet. App. 128a) is reported at *Wisehart v. State*, 484 N.E.2d 949 (Ind. 1985), *reh'g denied, cert. denied*, 476 U.S. 1189 (1986).

JURISDICTION

The judgment of the court of appeals was entered on May 10, 2005. Pet. App. 1a. A petition for rehearing and rehearing en banc was denied on June 24, 2005. Pet. App. 154a. On September 16, 2005, Justice Stevens extended the time for filing a petition for a writ of certiorari to November 21, 2005 (No. 05A268). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST., amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST., amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d)

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

The United States Court of Appeals for the Seventh Circuit granted a writ of habeas corpus under 28 U.S.C. § 2254 to Mark Allen Wisehart, a prisoner of the State of Indiana who has been sentenced to death for his 1983 Madison County, Indiana convictions for murder, robbery, burglary, and theft. The court granted habeas relief because it concluded, in conflict with decisions from the First, Second, Fifth, Sixth, Ninth, Tenth, Eleventh, and District of Columbia circuits, but in agreement with the Third and Fourth Circuits, that Wisehart was entitled to a presumption of prejudice on his juror bias claims that the prosecution would be required to rebut at a hearing.

The Indiana Supreme Court considered this issue on appeal from denial of Wisehart's petition for state post-conviction relief and concluded that the Sixth Amendment does not require such a hearing or presumption. Pet. App. 124a-125a. That judgment was overruled by the decision below, notwithstanding (1) a deep circuit conflict over the issue and (2) the requirement of 28 U.S.C. § 2254(d)(1) that state court rulings be upheld unless they contravene or unreasonably misapply "clearly established" federal law. The decision below ignored both the section 2254 standard and decisions from other circuits and this Court saying that a rule is not "clearly established" for section 2254 purposes where it is the subject of a the circuit conflict.

1. The Underlying Facts

On direct appeal, the Indiana Supreme Court recited the following facts relating to Wisehart's crimes:

> The facts tend to show that at 10:30 p.m. on October 9, 1982, Anderson, Indiana police officer

Wasilewski entered Apartment 304 at 29th and Brown Streets. The police had received a phone call informing them they would find the body of a woman at that location. Officer Wasilewski, receiving this information by radio dispatch, found the body of Marjorie Johnson at said apartment. Her clothing was torn and wrapped around her mid-section and her head beaten and bloody. A bloody butter knife was lying near her body and numerous stab wounds appeared on her body. What appeared to be her billfold, with the contents removed and scattered was found on the bathroom floor.

Marjorie Johnson had been a regular visitor at the Christian Center where Mark Wisehart resided. The director of the Christian Center said that on the morning after the murder he noticed Mike Wisehart look at the papers, go straight to the article about Marjorie Johnson's murder, read it, and return the paper. Another resident of the Center, also named Johnson, said that earlier Wisehart had sent a letter to Johnson, talking about going to old people's houses and robbing them. The letter was put into evidence and it concluded by saying defendant Wisehart would be armed and would kill if anyone got in his way. Johnson testified that he talked to Wisehart after Marjorie Johnson's murder and Wisehart, aware Johnson would be a witness, said to him, "Try to make it look like I'm crazy." (Record at 1118).

On October 15, Officer Tracy and Detective Brown went to the Christian Center to pick up Mark Wisehart. He was cooperative and agreed to go to the police station. Once there, he executed a written waiver of rights and gave statements to the police confessing to this crime. In his statements to the police he admitted stabbing Marjorie Johnson several times with several weapons, striking her with his fist and hitting her about the head with a whisky bottle. He also stated he went through her purse and took

> fourteen ($14.00) dollars. He admitted it was he who had tipped off the police, disguishing his voice in a high-pitched manner to sound like a woman. An autopsy performed by forensic pathologist John Pless indicated there were several severe blunt force injuries and fractures to Marjorie Johnson's head and thirteen stab wounds to her body. A photograph of her body shows cuts just at or below the left jawbone, stab wounds to the chest and one on the left shoulder. The fibroid cartilage commonly called the "Adam's apple" was fractured with hemorrhage and she also had broken ribs. The cause of death was determined to be multiple blunt force injury to the head and multiple stab wounds to the face and chest. The pathologist was not able to determine the time of death.

Pet. App. 129a-130a.

2. The State Court Proceedings

The State of Indiana charged Wisehart with murder, robbery, burglary, and theft. A jury found Wisehart guilty and recommended that Wisehart be sentenced to death. The state trial court agreed and followed that recommendation. Pet. App. 128a-129a.

On direct appeal, Wisehart raised claims that are unrelated to this petition. The Indiana Supreme Court affirmed the convictions and sentence. Pet. App. 128a. The state supreme court denied rehearing and this Court denied certiorari review. *Wisehart v. Indiana*, 476 U.S. 1189 (1986).

Next, Wisehart filed a petition for state post-conviction relief in the trial court. Among the claims he raised was that his jury was biased against him insofar as a juror learned mid-trial from an unknown, extraneous source that the reason for a delay in the trial was that Wisehart had taken a polygraph examination. At the evidentiary hearing,

Wisehart's only evidence regarding this claim was an affidavit from the juror who had learned of the polygraph. Pet. App. 124a-125a. Wisehart presented no evidence as to whether the juror knew of any results of that examination or if the juror told anyone else the information. *Id.* However, the record established that the jury had been instructed, after the relevant incident but before their deliberations, to "disregard any and all information that you derive from any other source," other than the evidence actually presented at trial. Pet. App. 157a. The record also established substantial evidence of guilt, including a detailed confession. Pet. App. 129a-130a. The state post-conviction court rejected his claim.

The Indiana Supreme Court affirmed on appeal. With regard to the juror claim, the state supreme court held that Wisehart's evidence failed to demonstrate that the juror's knowledge "had an impact on the jury verdict or were [*sic*] used improperly in arriving at a verdict." Pet. App. 124a-125a. The Indiana Supreme Court denied rehearing and this Court denied certiorari review. *Wisehart v. Indiana*, 526 U.S. 1040 (1999).

3. The Federal Habeas Corpus Proceedings

Wisehart then filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Southern District of Indiana. Among other claims, Wisehart argued that the Indiana Supreme Court incorrectly adjudicated his jury bias claim. The district court denied the petition, finding that the Indiana Supreme Court's adjudication of the juror claim was neither contrary to nor involved an objectively unreasonable application of clearly established federal law. Pet. App. 37a-39a. Furthermore, the district court noted that any error in that regard was harmless given curative jury instructions and overwhelming evidence of Wisehart's guilt. Pet. App. 39a. However, the district court granted a certificate of appealability on the issue.

The United States Court of Appeals for the Seventh Circuit reversed and granted a writ of habeas corpus on the jury bias claim unless the State either retries Wisehart or conducts another state post-conviction hearing on the jury bias claim. Pet. App. 9a. The court held that under *Remmer v. United States*, 347 U.S. 227 (1954), Wisehart's allegations required the state post-conviction court to conduct a more searching inquiry into the allegations of jury bias than it originally did. Pet. App. 7a-9a. If the State holds a new hearing (which may not even be possible under Indiana's procedures for post-conviction relief), the Seventh Circuit requires the prosecution to bear the burden of overcoming a presumption that the juror's knowledge of the polygraph test prejudiced Wisehart. Pet. App. 9a.

However, the court of appeals did not address the State's argument that *Remmer* is not "clearly established federal law" for habeas purposes given this Court's repeated subsequent retreats from it and a deep circuit conflict over *Remmer*'s continued significance. In its petition for rehearing, the State again advanced that argument. The court of appeals denied both panel and *en banc* rehearing without comment. Pet. App. 154a.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition to resolve a substantial, deep and important conflict among the circuits and states concerning who, under the Sixth Amendment, bears the burden where a criminal defendant alleges jury bias. It should also grant review to resolve whether, as every other circuit to consider it has held, and as this Court recently suggested, a rule that is the subject of an underlying conflict can be "clearly established" for habeas corpus purposes. Summary reversal may be appropriate concerning the latter issue.

I. The Decision Below Exacerbates a Circuit Conflict Over Whether the State Must Rebut a Presumption of Prejudice in Response to Jury Bias Claims

The decision below ruled that under *Remmer* the government always bears the burden of disproving prejudice whenever a criminal defendant asserts bias based on jurors' knowledge of extraneous information. Pet. App. 9a. *See Remmer*, 347 U.S. at 229. This holding is in accord with rulings from two other circuits, but a majority of circuits have rejected such a rule. The lone circuit where the vitality of *Remmer* remains an open issue is the Eighth Circuit. *Tunstall v. Hopkins*, 306 F.3d 601, 611 n.6 (8th Cir. 2002), *cert. denied*, 538 U.S. 968 (2003).

1. Only the Third, Fourth, and Seventh Circuits still automatically apply the *Remmer* presumption to jury bias claims. *Moore v. Knight*, 368 F.3d 936, 942-43 (7th Cir. 2004); *Fullwood v. Lee*, 290 F.3d 663, 678 (4th Cir. 2002), *cert. denied*, 537 U.S. 1120 (2003); *United States v. Console*, 13 F.3d 641, 666 (3rd Cir. 1993), *cert. denied sub nom. Curcio v. United States*, 511 U.S. 1076 (1994), *and Markoff v. United States*, 513 U.S. 812 (1994). *But see Conner v. Polk*, 407 F.3d 198, 206 n.4 (4th Cir. 2005) (questioning the continued vitality of the *Remmer* presumption), *petition for cert. filed*, No. 05-7270.

The Eleventh Circuit, curiously, has also applied the *Remmer* presumption, but in doing so ignored its prior precedent to the contrary. *Compare Parker v. Head*, 244 F.3d 831, 839 (11th Cir.) (presuming prejudice under *Remmer*), *reh'g and reh'g en banc denied, cert. denied*, 534 U.S. 1046 (2001), *with United States v. Rowe*, 906 F.2d 654, 656-57 (11th Cir. 1990) (placing burden on defendant), *reh'g denied*. *Parker* acknowledged the circuit split but found it unnecessary to decide the issue. *Parker*, 244 F.3d at 839 n.6.

2. Meanwhile, eight other circuits have departed from the *Remmer* rule in some fashion. The First, Fifth, Sixth, Ninth, Eleventh, and D.C. Circuits have held that the

Remmer presumption is improper in all but the most extraordinary and inherently prejudicial circumstances, such as jury tampering. *United States v. Sylvester*, 143 F.3d 923, 934 (5th Cir. 1998); *United States v. Williams-Davis*, 90 F.3d 490, 496 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 1128, *and sub nom. Restrepo v. United States*, 519 U.S. 1129 (1997); *United States v. Boylan*, 898 F.2d 230, 261 (1st Cir.), *cert. denied*, 498 U.S. 849 (1990); *Rowe*, 906 F.2d at 656-57; *United States v. Madrid*, 842 F.2d 1090, 1093 (9th Cir.), *cert. denied*, 488 U.S. 912 (1988); *United States v. Pennell*, 737 F.2d 521, 532 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985).

In addition, the Tenth Circuit does not apply *Remmer* to habeas cases because it views the rule as one of federal criminal procedure and not federal constitutional law. *Cannon v. Mullin*, 383 F.3d 1152, 1170 (10th Cir. 2004), *cert. denied*, 544 U.S. __, 125 S. Ct. 1664 (2005). *See also id.* at 1180 (Kelly, J., concurring in part and dissenting in part) (further distinguishing the application of *Remmer* in federal criminal appeals and habeas corpus review of state confinement). And the Second Circuit has held that in habeas cases the *Remmer* presumption must yield to the harmless error standard articulated in *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), which effectively requires the habeas petitioner to prove actual bias before obtaining habeas relief. *Bibbins v. Dalsheim*, 21 F.3d 13, 16 (2nd Cir.), *cert. denied*, 513 U.S. 901 (1994). *See also Loliscio v. Goord*, 263 F.3d 178, 187-88 (2nd Cir. 2001) (criticizing the continued application of the *Remmer* presumption post-AEDPA, regardless of harmless error).

3. Moreover, the highest courts of Pennsylvania, Maryland, New Mexico, Ohio, South Carolina, Wyoming, and the District of Columbia have struggled with the proper allocation of the burden in jury bias cases. *Pratt v. St. Christopher's Hosp.*, 866 A.2d 313, 322 n.11 (Pa. 2005) (recognizing conflict); *Jenkins v. State*, 825 A.2d 1008, 1023-29 (Md. 2003) (applying presumption despite conflict); *State v. Mann*, 39 P.3d 124, 135 (N.M. 2002) (recognizing

conflict but reserving judgment); *State v. Hessler*, 734 N.E.2d 1237, 1251 (Ohio 2000) (observing that burden is defendant's), *cert. denied*, 532 U.S. 998 (2001); *State v. Grovenstein*, 517 S.E.2d 216, 217-18 (S.C. 1999) (placing burden on defendant), *rev'g* 493 S.E.2d 865 (S.C. Ct. App. 1997); *Miller v. State*, 904 P.2d 344, 353 (Wyo. 1995) (presuming prejudice under state constitution in light of federal conflict); *Hill v. United States*, 622 A.2d 680, 684 (D.C. 1993) (placing burden to prove prejudice on defendant and burden to prove harmlessness on government).

4. This rampant conflict and confusion over where the presumption should lie in jury bias claims owes its origins to the confusing rationale underlying *Remmer* and also to two post-*Remmer* decisions from this Court, *Smith v. Phillips*, 455 U.S. 209 (1982), and *United States v. Olano*, 507 U.S. 725 (1993).

In *Remmer*, after a juror reported attempted bribery, the trial court, without notifying the defense, directed the FBI to investigate. 347 U.S. at 228. This Court ruled that both the alleged attempted bribery and the resulting *ex parte* FBI communications with the jury presumptively prejudiced the defendant's Sixth Amendment right to a fair trial by an impartial jury. *Id.* at 229. A court faced with such *ex parte* communications, *Remmer* held, should hold a hearing at which the government bears the burden of proving that the contact was harmless to the defendant. *Id.*

However, the Court added that this presumption was required because of "the paucity of information relating to the entire situation" and "the kind of facts alleged." *Remmer v. United States*, 350 U.S. 377, 379-80 (1956) (*Remmer II*). This rather opaque explanation has sewed confusion concerning the extent to which the Court originally intended *Remmer* to supply a broadly applicable presumption of bias. *See, e.g.*, *Conner*, 407 F.3d at 206; *Tunstall*, 306 F.3d at 611 n.6; *Loliscio*, 263 F.3d at 187-88; *Williams-Davis*, 90 F.3d at 496; *Console*, 13 F.3d at 666; *Pennell*, 737 F.2d at 532.

Then, in *Phillips* the Court narrowed the application of the *Remmer* presumption. There, a juror applied for employment with the district attorney's office during Phillips's trial. On habeas review, the lower federal courts granted relief on the theory that the juror was implicitly biased. The Court reversed and held that, at least in habeas cases, it is the defendant's burden, not the government's, to prove actual juror bias and resulting prejudice. *Phillips*, 455 U.S. at 215. *Phillips* cited *Remmer*, but declined to continue the practice of rebuttably presuming juror bias (*id.*), apparently signaling a retreat from *Remmer*. *See id.* at 228 (Marshall, J., dissenting) (contrasting the Court's prior precedents with the new *Phillips* rule).[1]

The Court again retreated from the *Remmer* presumption of bias in *Olano*. There, alternate jurors were allowed to attend the jury's deliberations in violation of Fed. R. Crim. P. 24(c). In affirming the convictions, the Court held that the presence of alternate jurors at the deliberations cannot be presumptively prejudicial and that the defendants had "not met their burden of showing prejudice." *Olano*, 507 U.S. at 738-39, 741. Although Justice Kennedy observed that the

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[1] There is no substantive difference between the state court findings here and the trial court's findings in *Phillips* that were presumed correct. *Phillips*, 455 U.S. at 213-14, 218. Here, the trial court held an evidentiary hearing where Wisehart had the opportunity to prove bias and prejudice, but all Wisehart offered was one juror's affidavit attesting to the sole fact that he learned mid-trial that Wisehart was taking a polygraph examination. Pet. App. 124a-125a. The state courts found that his proof fell far short of proving prejudice. Pet. App. 125a, 39a. *See Phillips*, 455 U.S. at 218 (such a finding is presumed correct on habeas review). Indeed, the decision below enumerated various questions that the juror's affidavit—Wisehart's sole evidence—left unanswered. Pet. App. 8a. Thus, the Seventh Circuit apparently would have refused habeas relief had it concluded that Wisehart bore the burden of establishing prejudice. Pet. App. 8a-9a.

burden of proof may rest differently when the issue has been properly preserved (*id.* at 741-42), *Olano* stands for the proposition that the burden of proof may properly lie with a defendant. Moreover, *Olano* treated *Remmer* as having weighed the likelihood of prejudice rather than as having applied a rigid presumption. *Id.* at 739.

* * * *

Unfortunately, the initial confusion concerning *Remmer*'s underlying rationale, combined with the apparent retreats in *Phillips* and *Olano*, have left the nation's courts in disarray over the proper Sixth Amendment standard for jury bias claims. To remedy this situation, the Court should grant the petition and reaffirm its admonition in *Olano* that courts must weigh the likelihood of prejudice following assertions of jury bias rather than rigidly presume injury.

II. The Decision Below Ignored Habeas Limits by Granting Relief Despite a Deep Division Among Lower Courts Concerning the Underlying Rule

Even assuming that federal law requires a presumption of prejudice in this case, the court of appeals granted habeas relief with no regard for the proper standard governing collateral review of state court adjudications. Under 28 U.S.C. § 2254(d), federal courts may not grant habeas relief unless a state court has reached a decision that is contrary to or an unreasonable application of "clearly established" federal law. *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002) (per curiam). The decision below did not even acknowledge that this standard applies here, much less apply it correctly. *See* Pet. App. 6a-9a.

1. Very recently, in *Kane v. Garcia Espitia*, 546 U.S. __, 126 S. Ct. 407, 408 (2005) (per curiam), the Court said that federal law is not clearly established for habeas purposes where the only basis for the rule is the Court's own dictum and selective authority from a circuit split. And, unlike the Seventh Circuit's decision here, the Fifth, Sixth, Eighth,

Ninth, and Tenth Circuits have held that habeas relief is inappropriate when there are significant disagreements among the federal circuits over the proper application of a rule. *Burgess v. Dretke*, 350 F.3d 461, 469 n.20 (5th Cir. 2003); *Carter v. Ward*, 347 F.3d 860, 864 (10th Cir. 2003); *Hernandez v. Small*, 282 F.3d 1132, 1143 (9th Cir.), *cert. denied*, 537 U.S. 851 (2002); *Tunstall*, 306 F.3d at 610-11; *McGhee v. Yukins*, 229 F.3d 506, 511-12 (6th Cir. 2000). *See also Rubin v. Gee*, 292 F.3d 396, 412 (4th Cir.) (Motz, J., dissenting), *cert. denied*, 537 U.S. 1048 (2002).

2. Aside from these precedents, it is hard to understand how federal law can be called "clearly established," or a state court decision, even if ultimately deemed incorrect, can be called "unreasonable," where the Court's "precedents ... have not been a model of clarity." *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003). *See also Mitchell v. Esparza*, 540 U.S. 12, 17-19 (2003) (per curiam) ("A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous.").

This is certainly such a situation. The breadth of *Remmer*'s presumption of injury regarding jury bias claims has never been entirely clear, and *Phillips* and *Olano* have retreated from whatever rule *Remmer* established. The resulting ambiguity is only confirmed by the conflicting decisions of the federal circuits and state courts—a conflict that goes back more than twenty years. *See* pp. 8-10, *supra*. Lower courts simply do not have clear guidance on when to presume prejudice for jury bias claims.

3. In short, where the federal circuits and state courts have reached conflicting decisions over the rule that would be applied to give relief, the "clearly established" standard is not met. The decision below "ultimately substituted its own judgment for that of the state court, in contravention of section 2254(d)." *Visciotti*, 537 U.S. at 25. This failure to apply section 2254(d) offends the nature and purpose of federal habeas review. *Garcia Espitia*, 126 S. Ct. at 408;

Holland v. Jackson, 542 U.S. 934, 652-53 (2004) (per curiam); *Middleton v. McNeil*, 541 U.S. 433, 437-38 (2004) (per curiam); *Andrade*, 538 U.S. at 72; *Esparza*, 540 U.S. at 17-19; *Price v. Vincent*, 538 U.S. 634, 639 (2003); *Early v. Packer*, 537 U.S. 3, 10-11 (2002) (per curiam). The Court should grant the petition and either summarily reverse or undertake plenary review of this issue.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below should be reversed.

Respectfully submitted,

STEVE CARTER
Attorney General
THOMAS M. FISHER*
Solicitor General
STEPHEN R. CREASON
Section Chief and Deputy
Attorney General

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6201

**Counsel of Record*

Counsel for Petitioner

Dated: November 21, 2005

APPENDIX

APPENDIX TO
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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-1632

MARK A. WISEHART,

Petitioner-Appellant,

v.

CECIL DAVIS,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 98 C 1027—**Larry J. McKinney**, *Chief Judge.*

ARGUED MARCH 23, 2005—DECIDED MAY 10, 2005

Before FLAUM, *Chief Judge*, and POSNER and WOOD, *Circuit Judges.*

POSNER, *Circuit Judge.* In 1983 an Indiana jury found Mark Wisehart guilty of murder and robbery of an elderly woman, the burglary of her home, and the theft of her property. The jury recommended the death penalty, and the judge agreed and sentenced Wisehart accordingly. After exhausting state judicial remedies in *Wisehart v. State*, 484 N.E.2d 949 (Ind. 1985), 693 N.E.2d 23 (Ind. 1998), Wisehart unsuccessfully sought federal habeas corpus, and has now appealed to us.

The police discovered the body as the result of an anonymous phone call—by Wisehart himself, who disguised his voice. Wisehart lived in a homeless shelter called the "Christian Center" to which his victim had been a regular visitor. Another resident, a companion in crime to Wisehart named Johnson, testified that Wisehart had sent him a series of letters in which he talked about going to old people's houses and robbing them and killing anyone who got in the

way; the letters were placed in evidence. Johnson also testified that after the murder Wisehart, realizing that Johnson would be a witness, told him: "Try to make it look like I'm crazy."

Wisehart gave the police a full and detailed confession a week after the murder. His defense at trial was that he was insane and his confession (which he admitted making) false. He makes two arguments. (A third, that some of the jury instructions suggested he might be convicted on the basis of a mere preponderance of the evidence, was procedurally defaulted and is anyway completely without merit.) The first argument is that the state violated the *Brady* doctrine (see, e.g., *Strickler v. Greene*, 527 U.S. 263, 280-82 (1999); *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *United States v. Fallon*, 348 F.3d 248, 251-52 (7th Cir. 2003)) by failing to disclose benefits that Johnson had received as a result of his agreeing to testify. The prosecution's giving a witness benefits—leniency, cash, or anything else—can be used by a cross-examining defense counsel to undermine the witness in two, possibly three, distinct ways. The first and most common is by showing that the benefits were given in return for the witness's providing testimony that would help the prosecution. He might have told the prosecutor what he would testify to if called and the prosecutor might have explicitly agreed to give him specified benefits if he testified consistently with his proffer. E.g., *Giglio v. United States*, 405 U.S. 150, 152-55 (1972); *Abbott v. United States*, 195 F.3d 946, 948-50 (7th Cir. 1999); *Shabazz v. Artuz*, 336 F.3d 154, 161-62 (2d Cir. 2003). Or there might have been a tacit understanding that if his testimony was helpful to the prosecution, the state would give him a break on some pending criminal charge. Another example of an implicit agreement would be if the prosecutor promised a witness $100,000 contingent on the defendant's being convicted. Cf. *United States v. Villafranca*, 260 F.3d 374, 380 (5th Cir. 2001). Express or tacit, either way there would be an agreement, it would be usable for impeachment, and it would have to be disclosed to the defense. But the Indiana Supreme Court found that in this case there had been no

agreement, express or implied, and as the finding has not been rebutted by "clear and convincing evidence," it binds us. 28 U.S.C. § 2254(e)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 324 (2003); *Barrow v. Uchtman*, 398 F.3d 597, 602-03 (7th Cir. 2005). The finding further implies that Johnson was not testifying falsely when he denied having any "kind of deal" with the prosecution regarding his other crimes; a deal is an agreement. And so there was no violation of the rule of *Napue v. Illinois*, 360 U.S. 264 (1959).

The second way of invoking *Brady* is by showing that although there was no quid pro quo, the state, as in our *Boyd* and *Williams* cases, *United States v. Boyd*, 55 F.3d 239, 243-45 (7th Cir. 1995); *United States v. Williams*, 81 F.3d 1434, 1438 (7th Cir. 1996); see also *United States v. Sipe*, 388 F.3d 471, 488-90 (5th Cir. 2004); *United States v. Soto-Beniquez*, 356 F.3d 1, 41 (1st Cir. 2004), had lavished benefits (sex, free longdistance calls, cash, or what have you) on its witnesses in the hope of making them feel part of the state's team and as a result inclined, out of gratitude, friendship, or loyalty, to testify in support of the prosecution. In *Sipe*, for example, the aliens who testified for the government "were given . . . significant benefits, including Social Security cards, witness fees, permits allowing travel to and from Mexico, travel expenses, living expenses, some phone expenses, and other benefits. They were essentially given all, and more, of the benefits they were arrested for trying to obtain illegally—benefits so valuable that they took great risks to obtain them by crossing the border illegally . . . . [Prosecutors stated] that the aliens needed to be 'kept in orbit'; that the agents needed to maintain 'close control' over the witnesses; that they must be kept 'in pocket'; and that the aliens needed to be 're-commit[ted] to the cause.' This evidence, which was withheld from Sipe, reveals that the aliens were dependent upon the government for their most basic needs, such as visiting and communicating with their families." 388 F.3d at 488-90. There is nothing comparable here.

There may be a third category; it could be thought intermediate between the first two. This would be the definite benefit that is neither a quid pro quo nor lavish, yet permits an inference that the witness's testimony would be affected. Suppose the prosecutor had given Johnson $500, with no words exchanged, and later called him as a witness. Johnson might think either that his acceptance of the money had created an obligation to cooperate with the prosecution or that he should cooperate out of gratitude. There would be an argument for requiring disclosure of such a benefit, especially as the requirement would not create the problem of fuzzy boundaries that requiring disclosure of a mere forbearance to prosecute a witness for unrelated crimes, discussed next, would create. We need not decide how strong an argument; Johnson received no such definite benefit.

What is decisive for this case is this court's refusal to recognize a fourth *Brady* category, in which the state merely doesn't come down as hard on a witness as it could. "Todd cannot prove an agreement existed. He argues that at the very least Nielson had an 'expectation' of benefit. But what one party might expect from another does not amount to an agreement between them. And Todd does not argue that the state knew of Nielson's expectation or that he could not have uncovered that expectation with reasonable diligence. This brings us back to the agreement, which Todd cannot show existed. Without an agreement, no evidence was suppressed, and the state's conduct, not disclosing something it did not have, cannot be considered a *Brady* violation." *Todd v. Schomig*, 283 F.3d 842, 849 (7th Cir. 2002). Or as the Second Circuit put it in *Shabazz v. Artuz*, *supra*, 336 F.3d at 165 (emphasis in original), "The government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, *provided* that it does not promise anything to the witnesses prior to their testimony. ... [T]he fact that a prosecutor afforded favorable treatment to a government witness, standing alone, does not establish the

existence of an underlying promise of leniency in exchange for testimony."

The objections to the extension for which Wisehart contends are twofold. First, the category has no ascertainable boundaries. Rarely does the state end up charging a defendant with every possible crime that he may have committed. Because the state doesn't have the resources to do that, most criminal cases are disposed of pursuant to plea agreements that involve some concessions on its part. The implication of Wisehart's argument is that whenever the state uses a criminal as a witness, which it does very commonly in criminal cases, the entire history of the state's dealing with the individual must be excavated and displayed and inspected for intimations of leniency, and perhaps all his hypothetical future dealings as well, for he might think that cooperation now would yield benefits should he ever again become involved with the law. Any time the government had omitted to charge the witness with a crime, the omission would have to be disclosed to defense counsel and explained to the jury, unless the statute of limitations had run, since until then the government could punish the witness for unsatisfactory testimony by prosecuting him for the crime. But second, the impeachment value would be slight, once charging practices were explained to the jury.

Evidence presented in Wisehart's postconviction proceedings, and thus not available to the defense at trial, indicated that the state had not prosecuted Johnson for two burglaries that they suspected him of having committed, because they didn't want by doing so to dissuade him from testifying against Wisehart; they didn't want to antagonize him. But what would knowledge of this motive of the state's have added to the jury's consideration? Had the prosecutor testified that *of course* the state didn't want to risk losing a witness in a capital case merely to be able to convict the witness of burglary, this would not have helped Wisehart.

Yet "certainly Johnson was aware of the benefits he was receiving for providing what the police thought to be valuable testimony." 693 N.E.2d at 58 n. 50. And it's just a step from that to thinking that it would have been reasonable for Johnson to assume that if he failed to cooperate, the state might revive the charges against him. He thus had something to gain by testifying against Wisehart and much to lose if he stopped cooperating. But this just brings us back to the problem of indefinite boundaries. A criminal trial must not be allowed to turn into an inquiry into disparate treatment of criminals, with the witness being asked whether he'd received any benefit that he would not have received had the state not wanted his testimony and whether therefore he feared retaliation if he stopped playing ball. In sum, we cannot say that the Indiana Supreme Court's ruling "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

The other issue presented by the appeal is whether Wisehart was deprived of his right to trial by an impartial jury. In a postconviction hearing conducted more than a decade after his trial, Wisehart presented an affidavit from one of the jurors that stated: "I learned that Mark Wisehart had taken a polygraph test. The jury had been brought to the courthouse, and was preparing to begin court when we were told court would not be held that day. I learned the court session had been canceled because Mark Wisehart was to take a polygraph test. I do not recall who gave me the information about the polygraph. After the polygraph, the trial continued, and I never learned the results of [the] polygraph test." No effort was made to call the juror as a witness in an effort to obtain further detail of the incident, and no other factual inquiry was conducted; the quoted passage is the entire information we have about the incident.

Wisehart points to the statement in the Supreme Court's decision in *Remmer v. United States*, 347 U.S. 227, 229 (1954), that "in a criminal case, any private communication,

contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial . . . . The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the jury was harmless to the defendant." Ripped from its context, the statement is difficult to take seriously, because it is so easy to imagine situations in which a "private communication . . . with a juror during a trial about the matter pending before the jury" would not create a rational presumption of prejudice. Suppose a juror's spouse said to the juror, "I saw you on television in the jury box, and you looked great." That would be a private communication concerning the case, but it would not be suggestive of jury tampering. General language does not decide particular cases, as Holmes liked to say. Judges expect their pronunciamentos to be read in context, which in *Remmer*, as the Court went on explain, involved "the sending of an F.B.I. agent in the midst of a trial to investigate a juror as to his conduct"—something that "is bound to impress the juror and is very apt to do so unduly. A juror must feel free to exercise his functions without the F.B.I. or anyone else looking over his shoulder." *Id.*

In short—and the subsequent case law is in accord with this interpretation of *Remmer*—the extraneous communication to the juror must be of a character that creates a reasonable suspicion that further inquiry is necessary to determine whether the defendant was deprived of his right to an impartial jury. How much inquiry is necessary (perhaps very little, or even none) depends on how likely was the extraneous communication to contaminate the jury's deliberations. *Evans v. Young*, 854 F.2d 1081, 1083-84 (7th Cir. 1988); *Dyer v. Calderon*, 151 F.3d 970, 974-75 (9th Cir. 1998) (en banc); *United States v. Williams-Davis*, 90 F.3d 490, 499-501 (D.C. Cir. 1996); see generally *Oswald v. Bertrand*, 374 F.3d 475, 477-78, 480 (7th Cir. 2004). The Indiana Supreme Court failed to apply this test or any reasonable variant of it. All the court said was that Wisehart

had failed to present "live testimony" or any other evidence besides the affidavit, that the affidavit didn't indicate that the jury had been biased as a result of learning about the polygraph test, and that there is no indication that any other jurors learned about it. The first point is irrelevant; the affidavit was evidence. The second point shows only that the affidavit does not *prove* that the juror was biased but merely raises a suspicion. The third point is irrelevant, because a defendant is entitled to be tried by a jury no member of which has a bias induced by extraneous matter. *Williams v. Bagley*, 380 F.3d 932, 943-44 (6th Cir. 2004); *United States v. Brande*, 329 F.3d 1173, 1178 (9th Cir. 2003); see also *Morgan v. Illinois*, 504 U.S. 719, 729 (1992); *Smith v. Phillips*, 455 U.S. 209 (1982); *Remmer v. United States*, *supra*, 347 U.S. at 229.

The affidavit was sufficient to necessitate a further inquiry at which the judge would have asked the juror how she had reacted to learning about the polygraph test. From the fact that the trial resumed after the test had she assumed that Wisehart had flunked it? If so, had she thought polygraph tests such reliable detectors of lies that she inferred that Wisehart must be guilty? The reliability of polygraph tests remains an open question (see references in *United States v. Scheffer*, 523 U.S. 303, 309-12 (1998); *id.* at 333 (dissenting opinion); see also *United States v. Lea*, 249 F.3d 632, 638 (7th Cir. 2001); *King v. Trippett*, 192 F.3d 517, 522 (6th Cir. 1999); *Hubbard v. State*, 742 N.E.2d 919, 924 (Ind. 2001)), but some laypeople may think them infallible. *United States v. Scheffer*, *supra*, 523 U.S. at 313-14. Indiana worries about this; the prosecutor would have violated Indiana law had he told the jury that Wisehart had taken a polygraph test and flunked, since Wisehart hadn't stipulated to the admissibility of the test results. *Willey v. State*, 712 N.E.2d 434, 439-40 (Ind. 1999); *Wisehart v. State*, *supra*, 693 N.E.2d at 63 n. 72; *Sanchez v. State*, 675 N.E.2d 306, 308 (Ind. 1996).

It doesn't follow that permitting such evidence to be given in a criminal trial would violate the Constitution; a

violation of a state's rule on the admissibility of evidence is not a violation of federal law. But it does follow that smuggling the defendant's test result into the jury room would have required a hearing under the *Remmer* line of cases. The concern with extraneous material in the jury room is not limited to material that would be inadmissible at trial; if news about a defendant's having taken a polygraph test reaches the jurors under the table as it were, the defendant is denied an ability to put the results in—to explain for example that he had passed the test, or at least not failed it; to describe the weaknesses of lie detectors; and in short to pull, or at least try to pull, the sting.

What happened in this case was not so egregious as telling the jury *sub rosa* that Wisehart had taken and flunked a polygraph test. But it was bad enough to require a hearing, however abbreviated, to determine what impact the news that he had taken the test had on the jury.

Back in 1994 it would have been relatively easy to call the juror as a witness and ask her to explain her reaction to learning about the polygraph test, though she might have forgotten because the trial had been conducted in 1983. It will be all the more difficult today to reconstruct an incident now more than twenty years in the past. But it was the state's burden, given the juror's affidavit, to present evidence that the jury's deliberations had not been poisoned by the reference to Wisehart's having been given a polygraph test.

The judgment must therefore be vacated with directions that the state release Wisehart, retry him, or conduct a further postconviction hearing addressed to the issue of jury bias.

A true Copy:

Teste:

s/Gino J. Agnello
Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

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ENTERED
FEB 12 2004
U.S. CLERK'S OFFICE
INDIANAPOLIS, INDIANA

MARK A. WISEHART,	)	
	)	
Petitioner,	)	
vs.	)	No. IP 98-1027-C-M/S
	)	
CECIL DAVIS,	)	
	)	
Respondent.	)	

ENTRY ON PETITION FOR
WRIT OF HABEAS CORPUS

Mark A. Wisehart was convicted in the Madison Superior Court of the October 9, 1982, murder of Marjorie Johnson. He was sentenced to death. After challenging his conviction and sentence in the Indiana courts, he brought the present action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254(a).

For the reasons explained in this Entry, Wisehart's petition for a writ of habeas corpus must be **denied.**

I. Background

A. State Proceedings

Wisehart was charged in Madison County with Murder, Robbery, Burglary, and Theft. The defense theory was that someone other than Wisehart committed the offense and that Wisehart had confessed to something he did not do.

The State relied on the felony murder aggravator under Indiana law to support its request for the death penalty. On September 26, 1983, the trial court sentenced Wisehart to death on the murder charge.

Wisehart's convictions were affirmed on direct appeal in *Wisehart v. State*, 484 N.E.2d 949, 951-52 (Ind. 1985), *reh'g denied, cert. denied*, 476 U.S. 1179 (1986) (*Wisehart I*). The trial court's denial of Wisehart's petition for post-conviction relief was affirmed on appeal in *Wisehart v. State*, 693 N.E.2d 23 (Ind. 1998) (*Wisehart II*).

The facts favorable to the jury's verdict were set forth by the Indiana Supreme Court.

> The facts tend to show that at 10:30 p.m. on October 9, 1982, Anderson, Indiana police officer Wasilewski entered Apartment 304 at 29th and Brown Streets. The police had received a phone call informing them they would find the body of a woman at that location. Officer Wasilewski, receiving this information by radio dispatch, found the body of Marjorie Johnson at said apartment. Her clothing was torn and wrapped around her mid-section and her head beaten and bloody. A bloody butter knife was lying near her body and numerous stab wounds appeared on her body. What appeared to be her billfold, with the contents removed and scattered was found on the bathroom floor.

Wisehart I, 484 N.E.2d at 951-52. The evidence favorable to the jury's verdict also shows that Wisehart committed the homicide of Marjorie Johnson.

B. Wisehart's Claims

Wisehart's defense at trial was that someone other than Wisehart committed the crime and that Wisehart had confessed to something he did not do. Wisehart presents fifteen claims in this proceeding. These claims are the following:

A. The Prosecution withheld specifically requested material evidence and knowingly permitted a key witness to testify falsely and leave a false impression on the jury;

B. The Prosecutor placed false and misleading information before the jury, invoked inappropriate legal authority, urged the jury to consider factors beyond its power to consider, urged conviction and sentence for reasons outside the bounds of the law;

C. He was denied the effective assistance of counsel at trial, sentencing, and on direct appeal;

D. He was denied his right to due process when the trial judge gave jury instructions that lead the jury to believe it should convict on less proof than beyond a reasonable doubt and that misled and confused the jury about the "presumption of innocence";

E. There was insufficient evidence to support the finding of the "burglary" aggravating factor;

F. He was denied a fair and impartial jury when the jury was given information not introduced at trial by an outside source;

G. His inculpatory statement to police was improperly admitted;

H. The trial court erred by excluding relevant mitigating evidence at the sentencing and by refusing to weigh and consider relevant mitigating factors before imposing sentence;

I. He was denied meaningful appellate review of his death sentence;

J. Comments by the trial judge and the prosecutor improperly deprecated the jury's role in sentencing;

K. The State used an agent to acquire information against him after his right to counsel had attached;

L. He was denied a fair and impartial sentencing hearing and a reliable sentencing determination;

M. He was placed on psychotropic drugs by the jail physician without the knowledge of his attorney or that of the jury during crucial phases of the proceedings;

N. He was denied his right to conflict-free counsel; and

O. The trial court erred in restricting his cross-examination of a witness at trial.

II. Scope and Standard of Review

A. AEDPA

Wisehart seeks relief in this action pursuant to 28 U.S.C. § 2254(a). In the exercise of its habeas jurisdiction, a federal court may grant relief only if the petitioner shows that he is in custody "in violation of the Constitution or laws of the United States." 28 U.S.C. § 2254(a).

When a habeas petition is filed after enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) on April 24, 1996, that Act's restrictions on federal review of state court rulings apply to the case. *Henderson v. Walls*, 296 F.3d 541, 545 (7th Cir. 2002). Under the AEDPA, we may grant a writ of habeas corpus only if Wisehart demonstrates that the state court's adjudication of the claim was contrary to, or an unreasonable application of, federal law as determined by the United States Supreme Court, *see* 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362 (2000), or if the decision was premised on an unreasonable determination of facts. *See* 28 U.S.C. § 2254(d)(2).

A state court's decision is "contrary to" Supreme Court precedent if: (1) the state court applies a rule that contradicts the governing law set forth in Supreme Court cases; or (2) the state court confronts a set of facts that is materially indistinguishable from a Supreme Court case but arrives at a

different result. *Williams*, 529 U.S. at 405-06. Under the second prong of § 2254(d)(1), habeas corpus relief is appropriate if a state court unreasonably applies the facts of the case to governing Supreme Court precedent. *Id.* at 413.

> Unreasonable is more than just incorrect or erroneous, *Wiggins*, ___U.S. at ___, 123 S. Ct. at 2535; *Johnson*, 349 F.3d at 1034, and therefore federal courts defer to a state court's application of Supreme Court precedent as long as it is "minimally consistent with the facts and circumstances of the case," *Schultz v. Page*, 313 F.3d 1010, 1015 (7th Cir. 2002) (internal quotations and citation omitted), *cert. denied*, ___U.S. ___, 123 S. Ct. 2220, 155 L.Ed.2d 1107 (2003).

Danks v. Davis, 2004 WL 94047, at *2 (7th Cir. January 21, 2004).

This deferential standard only applies, however, to claims which the Indiana courts adjudicated on their merits. *See Ouska v. Cahill-Masching*, 246 F.3d 1036, 1046 (7th Cir. 2001); *Braun v. Powell*, 227 F.3d 908, 916-17 (7th Cir. 2000).

Factual issues determined by a state court are presumed to be correct, and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. *Werts v. Vaughn*, 228 F.3d 178, 196 (3d Cir. 2000) (*citing* 28 U.S.C. § 2254(e)(1)). This is a "rigorous burden of proof." *Sanchez v. Gilmore*, 189 F.3d 619, 623 (7th Cir. 1999). *See also Green v. White*, 232 F.3d 671, 672 n.3 (9th Cir. 2000) (although "the relationship between § 2254(d)(2) and § 2254(e)(1) is not entirely clear . . . the standard of review appears to be clear error under both statutory provisions.").

B. Procedural Default

In addition to the substantive standard set out above,"habeas corpus has its own peculiar set of hurdles a

petitioner must clear before his claim is properly presented to the district court." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 14 (1992) (O'Connor, J., dissenting) (internal citations omitted). "It is the rule in this country that assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas. Claims not so raised are considered defaulted." *Breard v. Greene*, 523 U.S. 371, 375 (1998) (citing *Wainwright v. Sykes*, 433 U.S. 72 (1977)). The purpose of the rule of procedural default is to "afford[ ] to the state courts an opportunity to correct a constitutional violation." *Duckworth v. Serrano*, 454 U.S. 1, 4 (1981).

> Before a federal court will consider a habeas petition, a petitioner must satisfy several procedural requirements. First, a petitioner must exhaust state remedies--that is, give the state's highest court an opportunity to address each claim. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 839, 119 S. Ct. 1728, 144 L.Ed.2d 1 (1999); *Wilson v. Briley*, 243 F.3d 325, 327 (7th Cir. 2001). To satisfy this requirement, a petitioner must present to the state judiciary both the operative facts and legal principles that control each claim. *See Wilson*, 243 F.3d at 327. Second, the petitioner must comply with state rules to avoid procedurally defaulting his claims. *See Boerckel v. O'Sullivan*, 135 F.3d 1194, 1196-97 (7th Cir. 1998), *rev'd. on other grounds by O'Sullivan v. Boerckel*, 526 U.S. 838, 849, 119 S. Ct. 1728, 144 L.Ed.2d 1 (1999).

Mahaffey v. Schomig, 294 F.3d 907, 914-15 (7th Cir. 2002).

Exhaustion, or more specifically, non-exhaustion, is not an issue in this action, but procedural default is a facet of certain of Wischart's habeas claims. Procedural default occurs either: (1) when a petitioner failed to exhaust state remedies and the court to which he would have been permitted to present his claims would now find such claims procedurally barred, *Coleman v. Thompson*, 501 U.S. 722,

735 n.1 (1990); or (2) "if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Id.*, at 729; *see also Williams v. Parke*, 133 F.3d 971, 973 (7th Cir. 1997); *Aliwoli v. Gilmore*, 127 F.3d 632, 634 (7th Cir. 1997). The consequence of presenting in a federal habeas petition a claim which has been procedurally defaulted is quite clear:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman, 501 U.S. at 750. "Cause" for a procedural default exists if the petitioner can demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Prejudice is demonstrated by showing that the errors worked to the petitioner's "actual and substantial disadvantage." *United States v. Frady*, 456 U.S. 152, 170 (1982). The Supreme Court has equated the miscarriage of justice standard with a claim of actual innocence. *See Sawyer v. Whitley*, 505 U.S. 333, 339 (1992). And, in order to establish a claim of actual innocence "[t]he prisoner must 'show a fair probability that in light of all the evidence [including that which was illegally obtained as well as that which was legally excluded]... the trier of facts would have entertained a reasonable doubt of his guilt.'" *Kuhlmann v. Wilson*, 477 U.S. 436, 455 n.17 (1986) (quoting Henry J. Friendly, **Is Innocence Irrelevant? Collateral Attack on Criminal Judgments**, 38 U. CHI. L. REV. 142, 160 (1970)).

III. INDIANA'S CAPITAL PUNISHMENT STATUTE

In assessing Wisehart's claims in this case, it is helpful to have a broad understanding of Indiana's capital punishment adjudication process. At the time of Wisehart's trial and sentencing, 30 of the 37 states that provided for the death penalty gave the life-or-death decision solely to the jury.[1] Of the remaining seven states, only Florida, Alabama and Indiana allowed a judge to override a jury's recommendation against death. *Spaziano v. Florida*, 468 U.S. 447, 463 & n.9 (1984).

The Indiana Supreme Court has described the operation of Indiana's capital sentencing scheme, set forth in IND. CODE § 35-50-2-9, in the following terms:

> Our death penalty statute provides three distinct steps which the trial court must take in reaching its sentencing decision in cases in which the jury has found the defendant guilty of Murder and the State seeks the death penalty. First, the trial court must find that the State has proved beyond a reasonable doubt that at least one of the aggravating circumstances listed in the death penalty statute exists. Second, the trial court must find that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances. This evaluation and weighing process should be described in the trial court's sentencing statement. Third,

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[1] Indiana's statute was amended, effective July 1, 2002. The current statute provides that (i) the court shall instruct the jury that, in order for the jury to recommend to the court that the death penalty or life imprisonment without parole should be imposed, the jury must find at least one (1) aggravating circumstance beyond a reasonable doubt as described in subsection (k) and shall provide a special verdict form for each aggravating circumstance alleged, and (ii) if the jury reaches a sentencing recommendation, the court shall sentence the defendant accordingly. IND. CODE § 35-50-2-9.

> before making the final determination of the sentence, the trial court must consider the jury's recommendation. However, the death penalty statute also provides that the trial court is not bound by the jury's recommendation.

Roark v. State, 644 N.E.2d 565, 570 (Ind. 1994).

IV. Discussion

A. *Brady*

Gregory Scott Johnson was a key witness for the State. Wisehart claims that the prosecutor committed misconduct by withholding information demonstrating, or which a reasonable jury would find demonstrates, a deal was made with Johnson for his testimony, and by withholding information independent of an actual deal from which a reasonable jury would conclude that Johnson was motivated to testify falsely.

The first of these specifications of misconduct implicates the holding of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), pursuant to which the government has an obligation to disclose favorable evidence that is material to the case. The prosecution's duty to disclose evidence encompasses both exculpatory and impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

Wisehart contends that impermissible prosecutorial misconduct occurred when the prosecutor failed to respond completely and accurately to a motion to reveal agreements between the State and Johnson. The Indiana Supreme Court recognized that "'[t]he prosecution must disclose all

agreements made with a witness which may influence a witness'[s] testimony.'" *Wisehart II*, 693 N.E.2d at 57 (quoting *McCord v. State*, 622 N.E.2d 504, 509 (Ind. 1993)). This statement captures the essence of a *Brady* claim based on information which is asserted to be possible impeachment material. Impeachment evidence includes promises that the prosecution makes to key witnesses in exchange for their testimony. *Giglio v. United States*, 405 U.S. 150, 154-55 (1972).

The Indiana Supreme Court's ensuing application of this standard did not represent a decision contrary to federal law as determined by the United States Supreme Court. The Indiana Supreme Court also recognized that "the duty to disclose arises only when a confirmed promise exists." *Id.* This is in accord with the federal rule. *Collier v. Davis*, 301 F.3d 843, 849 (7th Cir. 2002) (the "general and hopeful expectation of leniency is not enough to create an agreement or an understanding" that they would, in fact, receive leniency in exchange for their testimony), *cert. denied*, 123 S. Ct. 1290 (2003); *see also Hill v. Johnson*, 210 F.3d 481, 486 & n.1 (5th Cir. 2000) (stating that only "an express agreement between the [s]tate and a witness," not "a witness' 'nebulous expectation of help from the state,'" constitutes *Brady* material); *Mastrian v. McManus*, 554 F.2d 813, 823 (8th Cir. 1977) (declining to read *Giglio* "to support [the] claim that a crucial witness's expectation of leniency must be revealed absent evidence of an express or implied promise").

Wisehart contended in *Wisehart II* that an agreement existed between Johnson and the State whereby the State would dismiss pending charges against Johnson in return for his testimony against Wisehart. The post-conviction court found otherwise, meaning that there was no such agreement. This finding was affirmed on appeal, and the Indiana Supreme Court's finding that there was no understanding or agreement between Johnson and the State is entitled to a presumption of correctness. *Shabazz v. Artuz*, 336 F.3d 154, 161 (2nd Cir. 2003) (citing *Wedra v. Thomas*, 671 F.2d 713,

717 (2d Cir. 1982)); *Burris v. Farley*, 51 F.3d 655, 661 (7th Cir. 1995).

There was no *Brady* violation, and hence no misconduct by the State, because there was no agreement between the State and Gregory Scott Johnson that the State would dismiss pending charges against Johnson in return for his testimony against Wisehart.

Wisehart also contends that he was denied a fair trial when the State knowingly produced false evidence, "independent of an actual deal," in Wisehart's words, from which a reasonable jury would conclude that Johnson was motivated to testify falsely. It is true that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.* Further, as the *Napue* Court explained, this principle "does not cease to apply merely because the false testimony goes only to the credibility of the witness" because "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Id.*

Wisehart's argument of false testimony is the flip side of his principal *Brady* claim, and hence fails for that same reason, which is that no false testimony occurred, because no "deal" existed between Johnson and the State. Wisehart has not shown otherwise by clear and convincing evidence. In addition, Johnson was cross-examined concerning his misconduct and the presence or absence of charges relating to that misconduct. Neither *Napue* or *Giglio* support Wisehart's claim. Unlike in those cases, Wisehart has not demonstrated that Johnson or other State's witnesses committed perjury. The fact, if it is a fact, that Johnson benefitted from his testimony does not, without more,

establish that an agreement existed. *Shabazz v. Artuz*, 336 F.3d at 165.

Wisehart's *Brady* claim and the related claim that the State knowingly permitted false testimony to be introduced at Wisehart's trial lacks a factual basis in the record, and hence does not support the relief he seeks in this case.

B. Prosecutor Misconduct

Wisehart contends that there was prosecutor misconduct on four occasions in statements made to the jury.

The Indiana Supreme Court confronted this claim in *Wisehart II*, and in doing so first noted that "Wisehart in the main asserts no basis for raising these prosecutorial misconduct claims for the first time on collateral review--he does not argue newly discovered evidence or ineffective assistance of counsel or even the ubiquitous fundamental error doctrine." *Wisehart II*, 693 N.E.2d at 56-57. The Indiana Supreme Court then noted that the State of Indiana argued the claim of prosecutor misconduct on the merits in the appeal from the denial of post-conviction relief, so it would likewise address the merits. *Id.*, at 57. With the exception noted below, the respondent does not argue that the claim of prosecutor misconduct is barred by procedural default. The Indiana Supreme Court's reference to procedural default on this point is somewhat less than a holding that the claim of prosecutor misconduct had been waived, though "[a] state court may reach the merits of a federal claim in an alternative holding; if it does so explicitly, then the independent and adequate state ground doctrine "curtails reconsideration of the federal issue on federal habeas." *Moore v. Bryant*, 295 F.3d 771, 775 (7th Cir. 2002)(citing cases). More to the point here, however, is that this court will not avert reaching the merits of a claim based on the doctrine of procedural default where the respondent has not made that argument.

In evaluating a claim of prosecutorial misconduct as a violation of the petitioner's due process right to a fair trial, the inquiry is whether the prosecutor's conduct "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

> In evaluating prosecutorial misconduct under governing Supreme Court law, it is not enough that the prosecutor's remarks were "undesirable or even universally condemned. The relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." As we pointed out in *Howard v. Gramley*, 225 F.3d 784, 793 (7th Cir. 2000), *Darden* sets forth several factors to inform this inquiry: "(1) whether the prosecutor misstated the evidence, (2) whether the remarks implicate specific rights of the accused, (3) whether the defense invited the response, (4) the trial court's instructions, (5) the weight of the evidence against the defendant, and (6) the defendant's opportunity to rebut." These factors, however, are not to be applied in a rigid manner, but should be used as a guide to determine whether there was fundamental unfairness that infected the bottom line. For that reason, we often have characterized the weight of the evidence as "the most important consideration."

Hough v. Anderson, 272 F.3d 878, 903 (7th Cir. 2001) (footnote and some internal citations omitted).

The Indiana Supreme Court recognized these principles in evaluating the claim of prosecutorial misconduct, though it addressed the issue in terms of the "grave peril" standard drawn from *Kent v. State*, 675 N.E.2d 332, 335 (Ind.1996) (citing *Smith v. State*, 516 N.E.2d 1055, 1063 (Ind. 1987)). *Wisehart II*, 693 N.E.2d at 57. In determining whether "grave peril" resulted, the Indiana courts look to "'the

probable persuasive effect of the misconduct on the jury's decision, not on the degree of impropriety of the conduct.'" *Id.* (quoting *Kent*, 675 N.E.2d at 335). Wisehart has not shown that the Indiana "grave peril" standard is materially different from the federal standard. This leaves for resolution whether the Indiana Supreme Court's resolution of the claim of prosecutor misconduct was an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States.

- Wisehart contends that it was inappropriate for the prosecution to suggest that, if the death penalty were not imposed, he might spend only 30 years in prison. The Indiana Supreme Court found this statement to have been an accurate statement of Indiana law. *Wisehart II*, 693 N.E.2d at 59-60 ("At the time of the murder Wisehart was accused of committing, the maximum term of years for which a person convicted of murder could be sentenced was 60 years; with good time credit, such an individual could be released in 30 years."). As noted in Part IV.L. of this Entry, moreover, the jury was entitled to an accurate statement of a potential sentencing alternative. The instruction given by the court provided such a statement. *Id.*, at 60 n.57 (quoting the pertinent instruction: "A person who commits murder shall be imprisoned for a fixed term of 40 years, with not more than 20 years added for aggravating circumstances or not more than 10 years subtracted for mitigating circumstances . . . ."). There was no misconduct by the prosecutor in this matter.

- Wisehart argues that the prosecutor committed misconduct by stating that the jury's role was to protect society, that Wisehart was not able to be reformed, and that the content of letters from Wisehart's own pen showed he possessed a criminal mInd. This is the specification of prosecutor misconduct which the respondent argues here was

waived, but the Indiana Supreme Court did not make a clear finding of waiver on this point, pointing out that the State had not asserted waiver on appeal. The Seventh Circuit has often noted that the procedural defense of waiver can itself be waived, and that is what occurred here in *Wisehart II*. In *Wisehart II*, 693 N.E.2d at 60, the Indiana Supreme Court found the prosecutor's advancing of "future dangerousness" as a reason for imposing the death sentence to have been improper. But it found this amounted to overzealous advocacy that reasonably could not have overcome the trial court's proper sentencing instructions including correct statements of aggravating and mitigating circumstances. *Id.* It also noted that the jury was properly instructed as to what aggravating factors could be found in order to recommend a death sentence and presumed that the jury followed such instruction. *Id.* This court agrees that in the setting presented, the prosecutor's argument concerning the role of the jury, the information it should consider, and what recommendation it should make was not so improper as to have denied Wisehart a fair trial. *Bowling v. Parker*, 344 F.3d 487, 516-17 (6th Cir. 2003).

• At the penalty phase, all evidence from the guilt phase was incorporated by reference. In his closing argument, the prosecutor contended that by its guilt phase verdicts, the jury had rejected Wisehart's mental condition as a mitigating circumstance. *Wisehart II*, 693 N.E.2d at 57. Wisehart contends that this comment by the prosecutor was improper, though his attorney conceded at final argument in the penalty phase that the jury had rejected Wisehart's mental condition as a possible mitigating factor on his responsibility for the crime. The Indiana Supreme Court did not find the prosecutor's comment to have been improper, because it found that the comment was reminding the jury that it had rejected Wisehart's contention that he had *acted* as a

result of mental disease or defect. This comment thus was not a misstatement of the events which had already occurred, and the jury was well aware that mitigation at the penalty phase could include factors separate from and beyond those which impacted on Wisehart's culpability for the crimes themselves.

- Wisehart also asserts error based on a statement by the prosecutor during the guilt phase that the jury should return a guilty verdict so that Wisehart would not commit rape. Wisehart was not charged with rape in this case, and there is no indication from the record, from the appellate opinions, or from the parties' arguments here that he was ever charged with rape or even considered a suspect in a rape. The prosecutor's reference, however, was rooted in a statement made by Wisehart himself in a letter which had been written by him and introduced into evidence. In that letter, Wisehart admitted to "commit[ing] about every crime there is except rape and murder." The Indiana Supreme Court thus viewed the prosecutor's statement as a comment on evidence which was before the jury and as "permissible advocacy." *Wisehart II*, 693 N.E.2d at 59. Given the context, it was not objectively unreasonable for the Indiana Supreme Court to have assessed the prosecutor's statement in this fashion.

The Indiana Supreme Court's decision that the specified remarks did not place Wisehart in a position of grave peril or undermine the reliability of the jury's death sentence recommendation contrary to the requirements of the Eighth Amendment was at least minimally consistent with the facts and circumstances of the case, see *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997), and hence did not amount to an "unreasonable application" of *Darden v. Wainwright*, 477 U.S. 168 (1986).

C. Effective Assistance of Counsel

Wisehart contends that he was denied the effective assistance of counsel at trial and in his direct appeal.

1. Sixth Amendment Standard. The Sixth Amendment right to counsel exists "in order to protect the fundamental right to a fair trial." *Strickland v. Washington*, 466 U.S. 668, 684 (1984). The purpose of the right is to ensure a fair trial, and the benchmark for judging any claim of ineffectiveness is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. For a petitioner to establish that his "counsel's assistance was so defective as to require reversal" of a conviction or a sentence, he must make two showings: (1) deficient performance that (2) prejudiced his defense. *Id.* at 687. The first prong is satisfied by a showing that counsel's performance fell below the "objective standard of reasonableness" guaranteed under the Sixth Amendment. *Barker v. United States*, 7 F.3d 629, 633 (7th Cir. 1993) (quoting *Strickland*, 466 U.S. at 688). In evaluating whether counsel's performance was deficient, "the court must defer to counsel's tactical decisions," avoid "the distorting effects of hindsight" and give counsel the benefit of a strong presumption of reasonableness. *Strickland*, 466 U.S at 689; *Holman v. Gilmore*, 126 F.3d 876, 881-82 (7th Cir. 1997). The prejudice prong of the *Strickland* test requires showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *see also Bell v. Cone*, 535 U.S. 685, 697-98 (2002). It is not enough for a petitioner to show that "the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. A petitioner must specifically explain how the outcome at trial would have been different absent counsel's ineffective assistance. *Berkey v. United States*, 318 F.3d 768, 773 (7th Cir. 2003).

"In a capital case, the two-prong *Strickland* analysis is applied at both the guilt and penalty phase." *Fugate v. Dep't of Corrs.*, 261 F.3d 1206, 1216 (11th Cir. 2002) (citing *Mincey v. Head*, 206 F.3d 1106, 1142 (11th Cir. 2000)). "Capital jurisprudence has long recognized that counsel's ability to advocate effectively during the sentencing phase is derived from adequate preparation directed specifically to the penalty phase." *Marshall v. Hendricks*, 307 F.3d 36, 99 (3d Cir. 2002). In the context of a capital sentencing proceeding, the relevant inquiry is "whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. Thus, in his concurrence in *Strickland*, Justice Brennan stressed:

> Of course, "[the] right to present, and to have the sentencer consider, any and all mitigating evidence means little if defense counsel fails to look for mitigating evidence or fails to present a case in mitigation at the capital sentencing hearing." Accordingly, counsel's general duty to investigate takes on supreme importance to a defendant in the context of developing mitigating evidence to present to a judge or jury considering the sentence of death; claims of ineffective assistance in the performance of that duty should therefore be considered with commensurate care.

466 U.S. at 706 (Brennan, J., concurring in part and dissenting in part) (internal citations omitted).

The *Strickland* standard has been most recently applied by the United States Supreme Court in *Wiggins v. Smith*, 123 S. Ct. 2527 (2003), in which the Court stressed that its endeavor was to "conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms,' *Strickland*, 466 U.S. at 688, which

includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Id.*, at 689. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland*, 466 U.S. at 700.

2. Contentions regarding guilt, penalty, and sentencing phases. Wisehart specifies multiple acts and omissions during the guilt, penalty, and sentencing phases of his trial which he asserts constituted ineffective assistance of trial counsel. Some of these were not presented to the Indiana state courts, and hence cannot be resolved on the merits here. As to the specifications of ineffective assistance which have been properly preserved, the many instances of pretrial activity, as well as the representation by Wisehart's attorneys at the guilt phase do not establish either deficient performance of counsel or prejudice to Wisehart. The Indiana Supreme Court's discussion of counsels' performance was not contrary to or an unreasonable application of Supreme Court precedent. As shown in the discussion of the several points with corresponding effect in this Entry–points which are asserted as separate claims–no constitutional error occurred in relation to the manner in which counsel represented Wisehart through the conclusion of the guilt phase. The Indiana Supreme Court's specific discussion and resolution of the contentions otherwise, *Wisehart II*, 693 N.E.2d at 40-47, does not run afoul of either prong of § 2254(d)(1) or of § 2254(d)(2). *See Balfour v. Haws*, 892 F.2d 556, 562-63 (7th Cir. 1989) (noting that for specific allegations of ineffective assistance courts must "weigh the overall quality of representation provided to the defendant" and not individual shortcomings). *United States v. Cronic*, 466 U.S. 648, 659 (1984), holds that, under certain circumstances, "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," then prejudice is presumed. Wisehart's contention that counsel was "functionally absent" at certain phases of the proceedings rests on his view that counsel did not perform adequately. Any sound basis for this position is refuted by the record, meaning that the *Strickland* standard is

applicable. *Bell v. Cone*, 122 S. Ct. 1843 (2002) (*Cronic* standard not applicable to claim that defense counsel's decision to present no mitigation evidence or closing argument at the sentencing stage was not objectively unreasonable); *cf. Patrasso v. Nelson*, 121 F.3d 297, 303-04 (7th Cir. 1997) (applying the little-used *Cronic* standard--where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, counsel could be adjudged ineffective without a showing of prejudice--and finding ineffective assistance at sentencing where counsel "made no effort to contradict the prosecution's case or to seek out mitigating factors").

Wisehart also contends that counsel was functionally absent from the penalty and sentencing phases of his trial. This is not so. Further, although there were aspects of counsel's preparation for the penalty phase that appear deficient, the Indiana Supreme Court was entirely correct that Wisehart suffered no prejudice as a result.

3. Contentions regarding direct appeal. The standard for judging a claim of ineffective assistance of counsel is the same for both trial and appellate lawyers. *Matire v. Wainwright*, 811 F.2d 1430, 1435 (11th Cir. 1987). The two-part *Strickland* analysis must, therefore, be applied to Wisehart's appellate counsel as well. This test was correctly recognized in *Wisehart II* as the controlling standard. As with the analysis of Wisehart's claim concerning the performance of his attorneys at trial, therefore, the question here is whether Wisehart is entitled to relief under the "unreasonable application" standard of § 2254(d)(1). A state court satisfies the reasonableness standard if its application is "at least minimally consistent with the facts and circumstances of the case." *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir.), *cert. denied*, 522 U.S. 819(1997); *see Hardaway v. Young*, 302 F.3d 757, 762 (7th Cir. 2002) (unreasonable application defined as outside the boundaries of permissible differences of opinion').

The record on appeal was adequate to resolve the claims which were presented on appeal, and Wisehart has not identified meritorious claims which were unable to be presented because of any materials the record did not include.

Where a defendant claims that counsel failed to raise the correct issues on appeal, the question is whether appellate counsel failed to raise a significant and obvious issue without a legitimate strategic purpose. *Franklin v. Gilmore*, 188 F.3d 877, 884 (7th Cir. 1999). Thus, we must examine the "trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Mason v. Hanks*, 97 F.3d 887, 893 (7th Cir. 1996).

To the extent that Wisehart's specifications of ineffectiveness of appellate counsel mirror the substantive arguments already considered in this Entry, those specifications do not entitle Wisehart to relief here because the substantive arguments are without merit, meaning that Wisehart was not the victim of deficient performance of appellate counsel, and that Wisehart suffered no prejudice from the representation of his appellate counsel. Conversely, to the extent that Wisehart's specifications of ineffectiveness of counsel present arguments which were not separately presented in *Wisehart II*, he has not identified claims which were clearly stronger than those presented in his direct appeal.

4. Summary. To evaluate the performance of counsel for Sixth Amendment purposes, the relevant perspective is the time of trial, not afterwards when everyone knows that counsel did not succeed in avoiding the death penalty. *See Kokoraleis v. Gilmore*, 131 F.3d 692, 696 (7th Cir. 1997) ("A trial may be adversarial and fair even if the chosen

strategy goes awry. Because counsel cannot experiment with different strategies, it is difficult in both principle and practice to know how best to proceed."). In order to prove that the assistance rendered by his defense counsel was constitutionally deficient, Wisehart must show that counsel's performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. "'[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.'" *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993) (*quoting United States v. Cronic*, 466 U.S. 648, 658 (1984)). It has been noted that "only a clear error in applying *Strickland's* standard would support a writ of habeas corpus," *Holman*, 126 F.3d at 882. While such errors do occur, *e.g.*, *Brown v. Sternes*, 304 F.3d 677 (7th Cir. 2002); *Roche v. Davis*, 291 F.3d 473, 483-84 (7th Cir. 2002), no such error occurred in Wisehart's case, and Wisehart has not met that burden with respect to his claims of ineffective assistance of counsel during the guilt phase and the penalty phase of his trial. The Indiana Supreme Court's decision to this effect was not "contrary to," nor was it an "unreasonable application of," clearly established federal law, and thus is impervious to federal habeas corpus relief.

D. Jury Instructions as to Reasonable Doubt and the Presumption of Innocence

Wisehart argues that two instructions given at the conclusion of the guilt/innocence phase of the trial lessened the State's burden of proving his guilt beyond a reasonable doubt. The two instructions which are at issue in this argument are the following:

> In clothing those charged with crime with the presumption of innocence, the law does not contemplate that thereby the guilty should be shielded from merited punishment. Its object is to protect the innocent, so far as human agencies can,

> from the effects of unjust verdicts. The effect of this presumption is to withhold punishment from one charged with crime until all the facts necessary to constitute the offense charged have been proved to that degree of certainty fixed by the law as beyond a reasonable doubt.

And:

> If a defendant is innocent, he should not be convicted erroneously; but, if a defendant is guilty, he should not be acquitted erroneously. By acquittal of the guilty a contempt of the law is aroused among the criminal classes and the safeguards of society are weakened.

No challenge to these instructions was presented by Wisehart in either his direct appeal or in his action for post-conviction relief. The failure to make such a challenge constitutes procedural default. Wisehart argues that exhaustion of this claim by presenting it to the Indiana courts was not required, however, because the Indiana Supreme Court has consistently refused to find instructions such as the above to be constitutional error. Wisehart finds support for this "futility exception" to exhaustion to be warranted by *Lynce v. Mathis*, 519 U.S. 433, 436 n.4 (1997). Wisehart is correct that the Indiana Supreme Court has held that the use of at least the first of the above instructions was not error in cases where the instruction was given before its decision in *Spradlin v. State*, 569 N.E.2d 948 (Ind. 1991). *See Nichols v. State*, 591 N.E.2d 134, 139 (Ind.1992).

Apart from the question of waiver, moreover, the two challenged instructions did not deprive Wisehart of a fair trial. The Due Process Clause of the Fourteenth Amendment protects an accused "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). Thus, "[t]he beyond a reasonable doubt standard is a requirement of due process . .

. ." *Victor v. Nebraska*, 511 U.S. 1, 5 (1994). While the Constitution requires that juries be instructed on the necessity that the defendant's guilt be proven beyond a reasonable doubt, it "neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." *Id.* "Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof." *Id.* (internal citation omitted). "Rather, taken as a whole, the instructions must correctly convey the concept of reasonable doubt to the jury." *Id.* (internal quotation marks and alteration marks omitted).

Improper jury instructions in state criminal trials rarely justify federal habeas relief. *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). In examining such a claim, the "inquiry is not whether there was prejudice to the [petitioner], or whether state law was violated, but whether there was prejudice of constitutional magnitude." *Galvan v. Cockrell*, 293 F.3d 760, 764 (5th Cir. 2002) (quoting *Sullivan v. Blackburn*, 804 F.2d 885, 887 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1901 (1987)). This, in turn, requires the petitioner to prove that the erroneous instruction "by itself so infected the entire trial that the resulting conviction violates due process." *Id.* at 764-65, quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). Moreover, there is a strong presumption that errors in jury instructions are subject to a harmless error analysis. *Id.* at 765. A constitutional error is harmless unless it "had a substantial and injurious effect or influence in determining the jury's verdict." *Id.*, quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993).

The two challenged instructions cannot be read or considered in isolation. *Johnson v. Texas*, 509 U.S. 350, 368 (1993) ("In evaluating the instructions, we do not engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would--with a commonsense understanding of the

instructions in light of all that has taken place at the trial.")(quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)); *Benefiel v. Davis*, 2004 WL 178071, at *6 (7th Cir. January 30, 2004) ("It is well-established that a "single instruction to the jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.")(citing cases). There were other instructions which made clear to the jury the State's burden of proof and the presumption of innocence. In light of the instructions as a whole, the giving of the two challenged instructions did not remove from the State its burden of proving Wisehart guilty beyond a reasonable doubt. Accordingly, apart from the question of whether the "futility" exception to the exhaustion requirement applies, Wisehart is not entitled to relief based on this claim.

E. Sufficiency of the Evidence as to Burglary

As noted previously, Wisehart was found eligible for the death penalty under the "felony murder" aggravating factor of committing a killing during the course of a burglary and robbery. Wisehart challenges the sufficiency of the evidence as to his conviction for Burglary as both a separate offense and as an aggravating factor making him death-eligible under IND. CODE § 35-50-2-9(b)(1)(b). As expressed in his petition, he contends that:

> [n]o reasonable trier of fact could have found beyond a reasonable doubt on the evidence presented at trial and sentencing that the State established the "breaking and entering" element necessary to show burglary.

"Burglary consists of the breaking and entering of a building or structure with the intent to commit a felony." *Moffatt v. State*, 542 N.E.2d 971, 975 (Ind. 1989)(citing IND. CODE § 35-43-2-1).

Wisehart contends that the Indiana Supreme Court did not assess the sufficiency of the evidence as to the Burglary.

but only as to the murder. He contends, therefore, that the Indiana Supreme Court did not reach the merits of his challenge to the sufficiency of the evidence as to the Burglary, and hence that the deferential standard of § 2254(d)(1) does not apply. *Newell v. Hanks*, 335 F.3d 629 (7th Cir. 2003) (citing cases).

In rejecting Wisehart's sufficiency claim on direct appeal, the Indiana Supreme Court stated that the jury "had more than ample facts before it which to make the finding they did." *Wisehart I*, 484 N.E.2d at 958. This statement is certainly susceptible of alluding to each of the jury's findings, at least each of the findings as to which Wisehart had presented a challenge to the evidence in his brief. He did, in fact, challenge the sufficiency of the evidence in his appellant's brief in *Wisehart I*. Understood in this fashion, the Indiana Supreme Court reached a decision concerning the sufficiency of the evidence as to the offense of Burglary.

It is also true, however, that the Indiana Supreme Court did not expressly discuss the elements of Burglary under Indiana law or the evidence in relation to those elements. Although this seems the less likely of the possibilities, given the context of Wisehart's arguments in his brief, it makes no difference in this case whether the AEDPA deferential standard is triggered. *See Johnson v. Bett*, 349 F.3d 1030, 1034-35 (7th Cir. 2003).

States are free, within broad limits, to define the elements of a crime. *Eaglin v. Welborn*, 57 F.3d 496, 500 (7th Cir. 1995) (*en banc*). Once a state has done so, however, the due process clause of the Fourteenth Amendment requires a state to prove beyond a reasonable doubt each element of the crime. *Victor v. Nebraska*, 511 U.S. 1, 5 (1994); *Eaglin*, 57 F.3d at 500.

Prior to the AEDPA, a challenge to the sufficiency of the evidence was analyzed in a federal habeas proceeding by determining "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact

could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The *Jackson* standard "must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." *Id.* at 324 n.16. The evidence at trial here included Wisehart's confession, wherein he states that he entered the victim's apartment through an unlocked door and brutally beat and stabbed the victim (T.R. 1443). As noted above, "breaking" is an element of the crime of Burglary in Indiana.

> Using even the slightest force to gain unauthorized entry satisfies the breaking element of the crime. For example, opening an unlocked door or pushing a door that is slightly ajar constitutes a breaking.

Davis v. State, 770 N.E.2d 319, 322 (Ind. 2002).

A federal habeas court is not entitled to reweigh the evidence under the guise of assessing its sufficiency. *Jackson*, 443 U.S. at 319. On the contrary, a federal habeas corpus court must presume that the jury resolved all reasonable inferences in the state's favor. *Id.*, 443 U.S. at 326; *Willard v. Pearson*, 823 F.2d 1141, 1150 (7th Cir. 1987). The only appropriate inquiry for this Court under *Jackson*

> is whether, assuming the jury resolved all disputes in the state's favor and drew all inferences from that evidence, it would have been rational to convict. Not whether we would convict, but whether thoughtful people could convict.

Branion v. Gramly, 855 F.2d 1256, 1266 (7th Cir. 1988).

Under the *Jackson* standard, whether pre-AEDPA or post-AEDPA, the evidence in this case was certainly sufficient to support the essential element of "breaking." Wisehart's challenge to the sufficiency of the evidence of the Burglary, both as a separate offense and as an aggravating

factor to make him eligible for the death penalty, therefore fails.

F. Right to Trial by an Impartial Jury

Wisehart claims that the jury was subject to extrinsic evidence and that this deprived him of a fair trial.

The Sixth Amendment guarantee of a trial by jury guarantees the right to trial by an impartial jury and requires that the jury verdict be based on the evidence presented at trial. *See Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965). Jury exposure to extrinsic evidence, *i.e.*, evidence not presented at trial, deprives a defendant of his Sixth Amendment rights to confrontation, cross-examination and assistance of counsel. *See Lawson v. Borg*, 60 F.3d 608, 612 (9th Cir. 1995). A petitioner is entitled to habeas relief, however, only if it can be established that the exposure to extrinsic evidence had "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson, 507* U.S. 619, 623 (1993). In other words, a petitioner must establish that the error resulted in "actual prejudice." *Id.*, at 637.

In *Wisehart II*, the Indiana Supreme Court set forth the basis for its review of this claim:

> To obtain relief on a claim of juror exposure to extrinsic evidence, an appellant must meet the three-part test in *Fox v. State*, 457 N.E.2d 1088, 1093 (Ind.1984), by showing by a preponderance of the evidence that: (1) the exposure to extrinsic material occurred; (2) the exposure is supported by the evidence; and (3) there is a likelihood that the verdict was affected.

Wisehart II, 693 N.E.2d at 63. Wisehart has not shown that Indiana's test as set forth above is materially different from the federal standard. This leaves for consideration the "unreasonable application" prong of § 2254(d)(1).

The Indiana Supreme Court considered this issue on Wisehart's appeal from post-conviction and explained that at the post-conviction hearing, Wisehart introduced the January 31, 1994, affidavit of a juror in Wisehart's trial. Wisehart argues in his habeas petition that there were three members of Wisehart's jury that were provided inadmissable evidence against Wisehart regarding a polygraph examination he took prior to trial and another polygraph examination he took during the trial. The Indiana Supreme Court's discussion on the extrinsic evidence was as follows:

> Wisehart does not point us to any live testimony or other evidence of any kind on this contention. (R. at 2217.) We conclude that this averment, standing as it does alone, does not entitle Wisehart to post-conviction relief. Our holding in *Fox* emphasized that we may determine the effect of the extrinsic evidence only after it is proven by a preponderance of the evidence that the jury saw or heard the material complained of. *Fox*, 457 N.E.2d at 1093. The affidavit gives no indication that any other juror was aware of this information. *See Butler v. State*, 622 N.E.2d 1035, 1040-41 (Ind.Ct.App.1993) (juror learned that someone fired a gun at a prosecution witness on the morning she was supposed to testify, and the court concluded that while there was evidence to support the juror's knowledge, the defendant failed to demonstrate a substantial possibility that the jury was improperly influenced). Wisehart does not contend that any other juror provided the post-conviction court with any information concerning a polygraph test. Additionally, the affidavit presented by Wisehart gives no indication that this information affected this juror's attitude toward the case in any way. Without a showing that any of these facts had an impact on the jury verdict or were used improperly in arriving at a verdict, no claim for relief is established.

Wisehart II, 693 N.E.2d 63-64 (footnotes omitted). The Indiana Supreme Court's determination that the jury's verdict was unaffected by the juror's exposure to the fact that Wisehart had taken a polygraph examination is a finding of fact which is entitled to the presumption of correctness under § 2254(e). Wisehart has not rebutted that finding by clear and convincing evidence. With that finding made, the Indiana Supreme Court's conclusion, in essence, that the exposure to the extrinsic information did not have a "substantial and injurious effect or influence in determining the jury's verdict" was not an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States. Accordingly, habeas relief is not warranted on this claim.

G. Admission of Wisehart's Statement to Police

The body of Marjorie Johnson had been found by Anderson police during the evening of October 9, 1982. On October 15, Officer Tracy and Detective Brown went to the Christian Center to pick up Wisehart. He was cooperative and agreed to go to the police station.

Once at the police station, he was fully advised of all of his *Miranda* rights prior to having given any confessions or statements to the police. As found by the Indiana Supreme Court:

> in his taped confession, taken immediately thereafter, it is apparent [Wisehart] was fully advised of all of his rights and he indicated he understood them.

Wisehart I, 484 N.E.2d at 952. Wisehart's October 15, 1982, statement to police was admitted as evidence during his trial, after his pre-trial motion to suppress had been denied. Wisehart contends that the motion to suppress should have been granted.

In *Miranda v. Arizona*, 384 U.S. 436, 467 (1966), the Supreme Court stated that custodial interrogations are inherently coercive.

> "*Miranda* thus declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation." *Edwards v. Arizona*, 451 U.S. 477, 482, 101 S. Ct. 1880, 68 L.Ed.2d 378 (1981). A defendant may waive effectuation of the rights articulated in *Miranda* "provided the waiver is made voluntarily, knowingly, and intelligently." *Miranda*, 384 U.S. at 444, 86 S. Ct. 1602. "When a *Miranda* waiver is challenged, two distinct questions are presented: whether the waiver was voluntary, knowing, and intelligent as a matter of fact, and whether it was involuntary as a matter of law." *Henderson v. DeTella*, 97 F.3d 942, 946 (7th Cir. 1996) (citations omitted).

Jackson v. Frank, 348 F.3d 658, 662-63 (7th Cir. 2003) (footnote omitted). A waiver is voluntary in the absence of coercion, and is knowing if made "'with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *United States v. Krilich*, 159 F.3d 1020, 1025-26 (7th Cir. 1998) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)).

The Indiana Supreme Court acknowledged the requirements of *Miranda* and the necessity for a valid waiver to exist before statements given during a custodial interrogation are admissible. There was, as the Indiana Supreme Court found, "no showing that the confession was extracted by any sort of threats or violence nor obtained by any direct or implied promises nor by the exertion of any improper influence." *Wisehart I*, 484 N.E.2d at 953.

The problematic evidence relative to Wisehart's waiver of his rights under *Miranda* is the testimony of Detective Brown. This appears in *Wisehart I*, 484 N.E.2d at 952:

> Detective Brown stated: "I advised him by signing it [the waiver] he was not admitting or denying any guilt or giving up any rights."

The Indiana Supreme Court construed officer Brown's testimony, quoted above, as a paraphrase of a "standard rights advisement . . . stressing that [Wisehart] could still terminate the interrogation and retain counsel." *Id.*, at 952. Understood in this fashion, Wisehart's *Miranda* waiver was voluntary in the sense that it was made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it–as well as the right to terminate the interrogation at any point until an attorney was present to consult. This is a finding by the Indiana Supreme Court that Wisehart understood Detective Brown's statement to mean, and as such is entitled to a presumption of correctness in this proceeding. *Jackson v. Frank*, 348 F.3d at 663 n.5 ("'[t]he state court's historical findings as to the petitioner's knowledge, understanding, and determination . . . are . . . entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1) . . . .'") (quoting *Henderson*, 97 F.3d at 946); *see also Valdez v. Ward*, 219 F.3d 1222, 1231 (10th Cir. 2000) (on federal habeas review, a federal court has to presume that the state court's factual finding that a defendant fully understood what was being said and asked of him was correct unless the petitioner shows otherwise by clear and convincing evidence); *Everett v. Barnett*, 162 F.3d 498, 500 (7th Cir. 1998) (explaining that whether habeas petitioner's *Miranda* waiver was voluntary is a question of law to which the § 2254(d) standard of review applies, although the underlying historical facts are afforded the presumption of correctness under § 2254(e)(1)). Wisehart has not shown by clear and convincing evidence, such as required by 28 U.S.C. § 2254(e)(1), that this factual finding is based on an unreasonable determination of facts. See 28 U.S.C. § 2254(d)(2).

H. Exclusion of Evidence at Penalty Phase

Wischart contends that the trial court excluded relevant mitigating factors in sentencing and refused to weigh and consider relevant mitigating factors before imposing a sentence.

It has been clearly established by the Supreme Court that the death penalty must be warranted by the unique aggravating and mitigating circumstances surrounding an individual defendant. See *Gregg v. Georgia*, 428 U.S. 153, 198 (1976). In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Supreme Court applied the rule it had announced in *Lockett v. Ohio*, 438 U.S. 586 (1978), and held that a sentencer may not "refuse to consider, as a matter of law, any relevant mitigating evidence" when contemplating a sentence of death. *Eddings*, 455 U.S. at 114. *See also Boyde v. California*, 494 U.S. 370, 377-78 (1990) (Eighth Amendment requires capital sentencers to consider "all relevant mitigating evidence" offered by defendant). This requirement exists because an individualized sentencing determination is required in death penalty cases pursuant to the Eighth and Fourteenth Amendments. *Clemons v. Mississippi*, 494 U.S. 738, 748 (1980).

A mitigating factor under the Constitution is "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). As Justice O'Connor has stated, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (Concur J. O'Connor).

The Indiana Supreme Court considered this issue on Wischart's appeal from post-conviction:

> "A trial court is under no duty to deem mitigating every factor so alleged by the defendant simply because it is supported by some evidence in the record." Bivins, 642 N.E.2d at 952. Our review of the record indicates that the trial court did consider all the mitigation evidence presented by Wischart, but found none of the circumstances to be mitigating. Furthermore, the trial court explained in its order why it did not find the evidence to rise to the level of mitigating circumstances within the meaning of the death penalty statute.

Wisehart II, 693 N.E.2d at 61-62 (footnote omitted).

After having considered the record on this claim, it is evident that Judge Newman, just as did the judge in *Benefiel*, "was aware that the evidence of childhood trauma and other psychological factors were, in fact, what mitigation was all about. It was simply that in his view those factors did not tip the scales when they were weighed against the aggravating factors." *Benefiel*, 2004 WL 178071 at *13. Accordingly, there is no merit to this claim.

I. Appellate Review of Sentence

Wisehart claims that the Indiana Supreme Court failed to appropriately review the actions of the trial court and failed to independently and accurately examine the record for the presence of mitigation and insure that mitigation was indeed considered and weighed. He contends that these failings denied him meaningful appellate review of his death sentence. The Respondent claims that Wisehart defaulted on this claim because he made no federal claim of error regarding the adequacy of the Indiana Supreme Court's review in the post-conviction action. The contention regarding Wisehart's asserted default as to this claim is without merit.

Nevertheless, Wisehart does not prevail as to this claim. Assuming that the review to which Wisehart refers is

constitutionally required, this court is in agreement with the following survey in *United States v. Plaza*, 179 F.Supp.2d 444, 461 n.15 (E.D.Pa. 2001):

> Meaningful appellate review in a statutory death penalty scheme plays a "crucial role . . . in ensuring that the death penalty is not imposed arbitrarily or irrationally." *Parker v. Dugger*, 498 U.S. 308, 321, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991); *see also Clemons*, 494 U.S. at 749, 110 S. Ct. 1441; *Gregg*, 428 U.S. at 195, 96 S. Ct. 2909. . . . To be "meaningful," appellate review must possess certain features. It must be prompt, *see Jurek v. State of Texas*, 428 U.S. 262, 276, 96 S. Ct. 2950, 49 L.Ed.2d 929; it must encompass "consider[ation of] the defendant's actual record," *Parker*, 498 U.S. at 321, 111 S. Ct. 731; and it may entail review of procedural matters such as jury selection, *see Gray v. Mississippi*, 481 U.S. 648, 665-66, 107 S. Ct. 2045, 95 L.Ed.2d 622 (1987).

The Indiana Supreme Court conducted a careful and meaningful review of Wisehart's death sentence on direct appeal in full conformity with the above principles. Specifically, the Indiana Supreme Court provided a thorough review of the death penalty statute in Indiana, the jury's recommendation and the trial court's findings which related to Wisehart's sentence, including the purported mitigating circumstances. In reviewing the trial court's findings and conclusions, the Indiana Supreme Court concluded:

> The jury recommended the death penalty to the trial judge and he made lengthy findings in sentencing Defendant. The trial judge indicated he had thoroughly examined the recommendation of the jury, the pre-sentence report filed in the case and the briefs and arguments by the parties. The trial judge then found that the State had proved beyond a reasonable doubt that Defendant Wisehart was guilty of four criminal counts: namely, murder, robbery,

burglary, and theft. He further found beyond a reasonable doubt Defendant intentionally killed the victim while committing the crimes of robbery and burglary as charged. He then considered the aggravating and mitigating circumstances required by Ind. Code § 35-50-2-9(b). He found as an aggravating circumstance, proved beyond a reasonable doubt, that Mark Alan Wisehart committed murder by intentionally killing the victim while committing burglary and robbery. He then considered each mitigating circumstance outlined in Ind. Code § 35-50-2-9(c) and found there were no mitigating circumstances in this case to mitigate the aggravating feature set out above. He found the defendant did have a significant history of prior criminal conduct for which he had been incarcerated several times. The trial judge further found that Wisehart had no remorse or intention to correct those criminal propensities and, in fact, found that Defendant demonstrated an intention to continue his criminal activities, killing his victims if necessary as evidenced by letters entered into evidence and other testimony. The trial judge proceeded to find there was some evidence the defendant had had occasional emotional problems in his life but there was no evidence he was under influence of extreme mental or emotional disturbance when he committed this murder. He found the victim did not participate in or consent to any of Defendant's conduct, nor was there any evidence that Defendant was an accomplice in the murder committed by another person with Defendant's participation being relatively minor. He referred to the fact that there was testimony of a possibility that there may have been another person or persons present but found there was no proof of any other person's participation and regardless of that possibility the defendant's participation in the event was major and resulted in intentional killing of the victim. He also found there was no evidence Defendant acted under the substantial domination of

another person. He found there was no mitigation as to Defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law because of mental disease or defect, or intoxication. He referred to the fact that several witnesses testified the defendant was sane. The jury had the benefit of two psychiatrists and other witnesses regarding this issue. He then found that although Defendant's youth might have been a mitigating factor, Defendant had led a life of crime and been incarcerated in several institutions. He then found that the actions and attitude of the defendant showed prior criminal conduct and conduct presently showing a criminal personality totally devoid of a compulsion for legal behavior. "His very thought processes are bent on evil and the accomplishment of misdeeds and malevolent behavior." (Record at 2455). He found that even though young in years, the defendant was quite mature in the ways of conducting criminal activity. In reviewing the trial judge's findings and conclusions, we find they are well supported by the evidence. Accordingly, we do not find the death penalty inappropriate in this case based on the crime, the manner in which it was committed, and the character of the perpetrator. We therefore affirm the trial court in all things, including its imposition of the death penalty.

Wisehart I, 484 N.E.2d 958-959.

Contrary to Wisehart's contention, the Indiana Supreme Court conducted the review to which he claims to be entitled to under the Eighth Amendment. On the basis of the foregoing, Wisehart is not entitled to federal habeas relief as to this claim.

J. Comments by the Trial Judge and the Prosecutor

In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the Supreme Court vacated a defendant's death sentence when it

found that the jury responsible for imposing the sentence was misled into believing that the responsibility for determining the appropriateness of the death sentence rested with the appellate court which later reviews cases, and not with the jury. *Id.* at 323. A *Caldwell* violation occurs where the jury is affirmatively misled regarding its role in the sentencing process so as to diminish its sense of responsibility. *Romano v. Oklahoma*, 512 U.S. 1, 8-9 (1994).

A petitioner can only establish a *Caldwell* violation if he shows that "the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, 489 U.S. 401, 407 (1989); *see also Fleenor v. Anderson*, 171 F.3d 1096, 1099 (7th Cir. 1999). At the time of Woods' trial, under the law of Indiana the jury made a recommendation on whether a defendant should receive the death penalty, but the trial court ultimately imposes the sentence. IND. CODE § 35-50-2-9.[2] The constitutionality of this scheme was reviewed and upheld in *Schiro v. Clark*, 963 F.2d 962, 969 (7th Cir. 1992) ("Regardless of its rationale, a state may constitutionally establish pure judicial sentencing in capital cases or it may permit judicial sentencing upon a non-binding, advisory recommendation from a jury, as Indiana has chosen to do."). As the Indiana Supreme Court noted,

> This Court previously has held that it is not unconstitutional to instruct the jury that the ultimate sentencing responsibility rests with the trial judge. *Lowery*, 640 N.E.2d at 1044, because such an instruction accurately reflects the requirements of Indiana law. An Indiana jury does not impose a sentence, but instead makes a sentencing

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[2] At the time Wisehart was sentenced, IND. CODE § 35-50-2-9(e)(2) read, "The Court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation." *See Benefiel*, 2004 WL 178071, *8 n.1 (7th Cir. January 30, 2004).

> recommendation to the judge, who in turn decides what sentence to impose.

Wisehart II, 693 N.E.2d at 53.

Here, the jury was informed, "You may recommend whether the death penalty should be imposed, although the Court is not bound by your recommendation." (T.R. at 325.) Contrary to Wisehart's suggestion, the jury was properly instructed as to its role in Indiana at the time the sentence was imposed. Accordingly, there was no *Caldwell* violation in Wisehart's case.

K. *Massiah*

Wisehart contends that the State violated his right to counsel under the Sixth Amendment by intentionally creating a situation that was likely to induce an incriminating statement from him to Gregory Scott Johnson, in the absence of counsel.

In *Massiah v. United States*, 377 U.S. 201, 206 (1964), the Supreme Court held that a defendant's right to counsel is violated when the government intentionally creates a situation likely to induce an incriminating statement from a charged defendant in the absence of counsel. Statements obtained by an informant are the functional equivalent of interrogation, and violate the accused's rights if the informant "took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986). Consequently, a jailhouse informant violates an accused's Sixth Amendment right to counsel when he (1) deliberately elicits statements (2) while acting as a government agent. *United States v. Li*, 55 F.3d 325, 328 (7th Cir. 1995).

The Indiana Supreme Court recognized that the rule of *Massiah* governs a claim of this nature. *Wisehart II*, 693 N.E.2d at 61. The Indiana Supreme Court did not reach a decision "contrary to" Supreme Court precedent by either (1)

applying a rule that contradicts the governing law set forth in Supreme Court cases, or (2) the confronting a set of facts that is materially indistinguishable from a Supreme Court case but arriving at a different result. *See Williams*, 529 U.S. at 405-06.

This leaves for determination whether the Indiana Supreme Court's resolution of Wisehart's *Massiah* claim was an unreasonable application of federal law as determined by the United States Supreme Court, *see* 28 U.S.C. § 2254(d)(1), or was premised on an unreasonable determination of facts.

Johnson testified that he visited Wisehart in jail and Wisehart, aware that Johnson would be a witness, had told him, "try to make it look like I'm crazy." As noted by the Indiana Supreme Court in *Wisehart II*, "Johnson gave no indication that he was acting on the State's behalf." 693 N.E.2d at 62. During the post-conviction hearing, however, Johnson testified that he was encouraged by the State to go visit Wisehart at the jailhouse in order to solicit information about the crime and that he visited Wisehart on more than one occasion. *Id.* Johnson's post-conviction testimony was not deemed credible. Its review of the evidence lead the Indiana Supreme Court to conclude:

> The evidence in this case gives rise to an inference that Johnson obtained the allegedly incriminating statements on his own independent from any alleged police persuasion and then changed his story at the post-conviction hearing to retaliate against the prosecutor.

Wisehart II, 693 N.E.2d at 62. This is a finding of fact that Johnson did not act as a government agent when speaking to Wisehart while Wisehart was in jail, and is entitled to the presumption of correctness under § 2254(e). *See Brooks v. Kincheloe*, 848 F.2d 940, 943-44 (9th Cir. 1988).

With this finding made, and relying on the analysis in *Kuhlmann* ("the Sixth Amendment is not violated whenever--by luck or happenstance--the State obtains incriminating statements from the accused after the right to counsel has attached."), the Indiana Supreme Court reasonably concluded that "[t]he evidence in this case does not sufficiently indicate that the State took some deliberate action to elicit incriminating statements from Wisehart." *Wisehart II*, 693 N.E.2d at 62. In the absence of deliberate action by the State, therefore, no meritorious claim under *Massiah* is present. This conclusion is bolstered by the Indiana Supreme Court's further finding, which Wisehart has not rebutted by clear and convincing evidence, that "there was no evidence as to any specific questions Johnson asked Wisehart in order to obtain the alleged incriminating statements." *Id.*

The Indiana Supreme Court explained that neither of the elements necessary for a violation of Wisehart's right to counsel under *Massiah* was present. This was not an unreasonable application of federal law as determined by the United States Supreme Court. Accordingly, habeas relief is not warranted on this claim.

L. Information Given to the Jury Concerning Alternative Penalties

Wisehart contends that he was denied due process of law when his jury was given inaccurate and misleading information about the alternative penalties that would be given if the jury did not recommend death. The premise of this argument is that the reliability of a sentencing proceeding is undermined when the trial court gives the jury incorrect information about the amount of time the defendant can be imprisoned if the sentence is other than death. The record shows, however, that the "incorrect information" part of this premise is itself incorrect.

When it comes to issues such as future dangerousness and the possibility of parole, the Supreme Court has

recognized that it is vitally important that "the jury [have] accurate information of which both the defendant and his counsel are aware," including "an accurate statement of a potential sentencing alternative." *California v. Ramos*, 463 U.S. 992, 1004, 1009 (1983). The trial court instructed the jury concerning the penalties for the various crimes with which Wisehart was charged. The information was accurate. *Wisehart II*, 693 N.E.2d at 60. There was no error in it having done so. *Fleenor v. Farley*, 47 F.Supp.2d 1021, 1063-64 (S.D.Ind. 1998).

M. Competency

Wisehart contends that he was placed on psychotropic drugs by the jail physician without the knowledge of his attorney or that of the jury during crucial phases of the proceedings. This claim fails to support relief in the circumstances of this case for several reasons.

- This claim has not been previously presented to the Indiana courts, either in Wisehart's direct appeal or in his post-conviction action. The claim is waived here. *See Lane v. Richards*, 957 F.2d 363, 366 (7th Cir.) (issues were not presented on direct appeal and relief would be barred by procedural default), *cert. denied*, 113 S. Ct. 127 (1992); *Kirk v. State*, 632 N.E.2d 776 (Ind.Ct.App. 1994) ("In seeking post-conviction relief, a petitioner must assert all available grounds for relief in his original post-conviction petition. P.C.R. 1(8)").

- This claim rests, if on anything, on the holding of *Riggins v. Nevada*, 504 U.S. 127, 136 (1992), which holds that a state may only administer anti-psychotic drugs to a criminal defendant pending trial over the defendant's objection upon proof that either "medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of the defendant's own safety or the safety of others," or that the state could not obtain an

adjudication of the defendant's guilt or innocence by using less intrusive means. The question here, however, is whether Wisehart's conviction and custody, including his sentence, resulted from any improper medication regimen. Apart from the questions of whether medicine was prescribed for Wisehart without the knowledge of his attorney, whether, in what doses, and at what time or times Wisehart received any medication, as well as what the psychiatric or behavioral antecedents of the administration of medication were, and whether any or all of this was "involuntary," the Seventh Circuit has held that the rule of *Riggins* is not to be applied retroactively. *Bennett v. United States*, 119 F.3d 468, 470 (7th Cir. 1997).

• The Due Process Clause of the Fourteenth Amendment prohibits states from trying and convicting mentally incompetent defendants. *Pate v. Robinson*, 383 U.S. 375, 384-86 (1966). The Supreme Court has "repeatedly and consistently recognized that 'the criminal trial of an incompetent defendant violates due process.'" *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (citations omitted). The issue of a defendant's competency to stand trial centers on whether he "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402 (1960); see also *Benefiel v. Davis*, 2004 WL 178071, at *3 (7th Cir. January 30, 2004) (citing *Dusky*). There is nothing in Wisehart's claim that psychotropic drugs were prescribed for him or in the administration of such drugs which is suggested here to have produced in Wisehart a condition at the guilt phase of his trial, at the penalty phase, or at other time a mentally incompetent defendant as defined in *Dusky*. *See Drope v. Missouri*, 420 U.S. 162, 180 (1975) (noting

that whether a defendant is capable of understanding the proceedings and assisting counsel is dependent upon evidence of the defendant's irrational behavior, his demeanor in court, and any prior medical opinions on his competence).

• The making of a retrospective competency determination in a federal habeas proceeding is difficult, though not impossible in many circumstances. *Id.*, 420 U.S. at 183; *Clayton v. Gibson*, 199 F.3d 1162, 1170 n.2 (10th Cir. 1999). Here, however, Wisehart offers no support for the intimation that the medication was not medically appropriate. Indeed, it was determined prior to trial that he was competent to stand trial and both court-appointed experts found Wisehart competent to stand trial. (T.R. 483).

This was fully sufficient to establish that Wisehart was competent to stand trial. *Quadrini v. Clusen*, 864 F.2d 577, 583 (7th Cir. 1989) ("We emphasize that the trial court is always in the best position to [determine the need for a competency hearing just as it is in the best position to] review, weigh and determine the credibility of the witnesses and resolve any inconsistencies in their testimony.").

• At Wisehart's competency hearing, Wisehart's counsel stipulated as to Wisehart's competence to stand trial and advised the court that all the psychiatrists' reports indicated (and Wisehart himself believed) that Wisehart was competent to stand trial. The court accepted the stipulation and asked that the record show that all the psychiatrists who examined Wischart reported that Wisehart was competent to stand trial. This determination is not challenged here with any showing which was made or offered to the Indiana state courts. As already noted, the Indiana courts will engage in such a determination even in a post-conviction proceeding. *Tinsley v. State*, 260 298 N.E.2d 429, 433 (Ind. 1973) ("In certain unique

> situations facts coming to light only after the trial may be so significant and compelling as to create 'reasonable grounds' to question a defendant's competency at the time of his trial and therefore require a hearing on the question."); *see also United States v. Teague*, 956 F.2d 1427, 1431-32 (7th Cir. 1992) (in order to be entitled to "a retrospective competency hearing, the appellant 'must present facts sufficient to positively, unequivocally and clearly generate a real, substantial and legitimate doubt as to [his] mental competence.'") (quoting *United States v. Collins*, 949 F.2d 921, 927 (7th Cir. 1991)); *United States ex rel. Bilyew v. Franzen*, 686 F.2d 1238, 1245 (7th Cir. 1982) (in attempting to determine whether a constitutional error in a defendant's competency hearing required reversal, stating that the "question is whether there is a reasonable possibility that [absent the constitutional error] the trial judge would have found [the defendant] unfit.").

On the basis of the foregoing, which encompasses both procedural and substantive factors, Wisehart is not entitled to federal habeas relief as to his claim that he was involuntarily medicated during his trial or at the penalty phase.

N. Conflict-free Counsel

Garry Miracle was appointed to represent Mark Wisehart. A few days before trial, the court appointed David Lipartito as co-counsel. Mr. Lipartito had already represented a man named Eric Steinke, who police had thought to be a witness/suspect in the case. Lipartito represented Steinke in October 1982, after police contacted Steinke about the Marjorie Johnson homicide and after Steinke had requested representation. Steinke was not charged with the homicide or any crime related to the homicide, although he had been a resident at the Christian Center, as was Wisehart, at the time of Wisehart's arrest.

Wisehart did not present this claim to the Indiana courts. It is procedurally defaulted. He has not shown cause for and prejudice from this default.

Apart from procedural waiver, this claim lacks merit. The federal constitutional right to effective assistance of counsel necessarily includes representation that is free from conflicts of interest. *Wood v. Georgia*, 450 U.S. 261, 271 (1981). To establish a violation of the Sixth Amendment due to a conflict, a defendant who failed to raise the objection at trial must demonstrate that trial counsel had an actual conflict of interest and that the conflict adversely affected counsel's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980).

Recently, the Supreme Court modified the standard for ineffective assistance of counsel based on a conflict of interest. *See Mickens v. Taylor*, 122 S. Ct. 1237 (2002). In order to prevail under the modified standard, Wisehart must establish that an actual conflict of interest adversely effected his attorney's performance. *Id.* at 1245. An actual conflict exists when an attorney actively represents incompatible interests; it is more than a "mere theoretical division of loyalties." *Id.* at 1243; *see also United States v. Pergler*, 233 F.3d 1005, 1009 (7th Cir. 2000) (an actual conflict of interest exists when a defense attorney is required to make a choice advancing his own interests to the detriment of his client's interests).

The decision in *Mickens* makes clear that whether the *Cuyler* standard applies to conflict of interest claims "is . . . an open question." *Id.* at 1246. Even so, however, Wisehart has not shown that Lipartito's brief and apparently inconsequential representation of Steinke resulted in an actual conflict. *See Cates v. Superintendent, Indiana Youth Center*, 981 F.2d 949, 955 (7th Cir. 1992) ("The premise of a defendant's claim that he was denied conflict-free assistance . . . must be that his lawyer would have done something differently if there was no conflict.").

For both these procedural and substantive reasons, therefore, Wisehart is not entitled to federal habeas relief based on his claim that he was denied his Sixth Amendment right to conflict-free representation by Mr. Lipartito.

O. Restriction on Cross-Examination

It was noted in *Wischart I*, that a key State witness at trial was Gregory Scott Johnson. Johnson testified about incriminating statements Wisehart made to him about planning to rob and kill old people, as well as the alleged statements petitioner made to him regarding his testimony "try to make it look like I'm crazy." He also testified that Wisehart through both verbal and nonverbal communication admitted he had killed the victim.

On cross-examination trial counsel attempted to question Johnson about two crimes he may have been arrested for, said offenses occurring after petitioner had been charged in this case. Counsel sought to show bias on Johnson's part since he received favorable treatment from the police and state on those arrests because of his willingness to testify against Wisehart. The trial court restricted defense counsel from questioning Johnson on those offenses unless defense counsel could prove that a deal existed prior to questioning Johnson about it. Wisehart now contends that his Sixth Amendment right to confront witnesses testifying against him was by preventing him from questioning Johnson as to uncharged misconduct to prove that the Johnson had a biased motive for testifying for the State.

Wisehart did not present this claim to the Indiana courts. It is procedurally defaulted. He has not shown cause for and prejudice from this default.

Apart from procedural waiver, this claim lacks merit. The Confrontation Clause of the Sixth Amendment protects a defendant's right to confront witnesses at the time of trial. *Delaware v. Fensterer*, 474 U.S. 15, 18 (1985). The right to cross-examine adverse witnesses is not absolute. A

defendant is entitled only to "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.*, at 20. This limitation is consistent with the concept that the right to confrontation is a functional one for the purpose of promoting reliability in a criminal trial. Indeed, "[n]ormally the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses." *Pennsylvania v. Ritchie*, 480 U.S. 39, 53 (1987); *see also Searcy v. Jaimet*, 332 F.3d 1081 (7th Cir. 2003).

In *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), the Supreme Court enumerated several factors that go into assessing whether error is harmless, including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." 475 U.S. at 684. Trial judges "retain wide latitude to impose reasonable limits on cross examination based on concerns about harassment, prejudice, confusion of the issues . . . or interrogation that is . . . only marginally relevant." *United States v. Neely*, 980 F.2d 1074, 1081 (7th Cir. 1992) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)).

Confrontation Clause cases are subject to harmless error analysis on habeas review. *Van Arsdall*, 475 U.S. at 684. Federal habeas courts must assess whether a claimed constitutional error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). To meet this standard there must be more than a "reasonable possibility" that the error contributed to the jury's verdict. *Id.*

As noted in *Wisehart II*, "the record reflects that Wisehart's counsel cross-examined both Johnson and Detective Hay on the question of Johnson's cooperation with

the police, indicating that Johnson had been involved in a number of burglaries for which he was never charged." *Wisehart II*, 693 N.E.2d at 58 n.50. Wisehart has not shown that any trial court's restriction on cross-examination had a substantial and injurious effect on the jury's verdict. First, despite the restriction, counsel was able to present his defense theory to the jury. Second, the evidence against Wisehart was substantial. There is no reasonable possibility that the restriction on cross-examining Johnson as to uncharged misconduct contributed to the jury's verdict.

V. Conclusion

Wisehart's prosecution, trial, conviction, and sentencing have received exhaustive review, both in this action for habeas corpus relief and in the Indiana state courts. Wisehart's conviction withstood challenge in the Indiana courts, and thus a presumption of constitutional regularity attaches to it. *See Farmer v. Litscher*, 303 F.3d 840, 845 (7th Cir. 2002) (citing *Parke v. Raley*, 506 U.S. 20, 29-30 (1992)); *Milone v. Camp*, 22 F.3d 693, 698-99 (7th Cir. 1994) ("Federal courts can grant habeas relief only when there is a violation of federal statutory or constitutional law").[3] As the foregoing discussion demonstrates, this court's view is that he received all that the Constitution requires.

> For a trial to be constitutionally sound requires . . . a trial where the prosecutor must prove all elements of a crime beyond a reasonable doubt in order to convict; where the prosecutor adheres to certain rules of conduct that guarantee a fair trial and a proper consideration of the defendant's theories and supporting evidence; where the jurors consider only evidence adduced by the parties and that a defendant

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[3] Obviously, this is not a presumption related to the AEDPA, but is "the 'presumption of regularity' that attaches to final judgments, even when the question is waiver of constitutional rights." *Parke v. Raley*, 506 U.S. at 29 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464, 468 (1938)).

has had an opportunity to rebut; and where a defendant enjoys the right to cross-examine adverse witnesses.

Gall v. Parker, 231 F.3d 265, 277-78 (6th Cir. 2000). This court's careful examination of the trial and post-conviction record, undertaken in conjunction with the claims presented by Wisehart in his habeas petition, leaves no doubt that he received a fair trial, extending through the sentencing proceedings. Wisehart's motion requesting oral argument is **denied.** "A defendant whose position depends on anything other than a straightforward application of established rules cannot obtain a writ of habeas corpus." See *Liegakos v. Cooke*, 106 F.3d 1381, 1388 (7th Cir. 1997). No such established rules entitle Wisehart to relief in this case. Wisehart's petition for a writ of habeas corpus is therefore **denied.** Judgment consistent with this Entry shall now issue.

IT IS SO ORDERED.

s/Larry J. McKinney
LARRY J. McKINNEY, Chief Judge
United States District Court

Date: 2/12/03

ATTORNEYS FOR APPELLANT	ATTORNEYS FOR APPELLEE
Susan K. Carpenter Public Defender of Indiana Thomas C. Hinesley Deputy Public Defender Janet S. Dowling, Special Assistant J. Jeffreys Merryman, Jr. Deputy Public Defender Indianapolis, Indiana	Pamela Carter Attorney General of Indiana James A. Joven Deputy Attorney General Indianapolis, Indiana

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FILED
MAR 19 1998
s/H. John Okeson
CLERK OF THE
INDIANA SUPREME COURT
COURT OF APPEALS
AND TAX COURT

IN THE
INDIANA SUPREME COURT

MARK ALLEN WISEHART, Appellant (Petitioner Below), v. STATE OF INDIANA, Appellee (Respondent Below).	Supreme Court No. 48S00-9005-PD-378

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas G. Wright, Special Judge
Cause No. 3SCR-82-204

ON DIRECT APPEAL FROM THE DENIAL OF
POST-CONVICTION RELIEF

SULLIVAN, Justice.

We review and affirm a post-conviction court's denial of

Mark Allen Wisehart's petition for post-conviction relief.

Background

Petitioner Mark Allen Wisehart appeals the denial of post-conviction relief with respect to his convictions for Murder,[1] Robbery,[2] Burglary,[3] and Theft[4] and his sentence of death.[5] We earlier affirmed Wisehart's direct appeal of these convictions and sentence. Wisehart v. State, 484 N.E.2d 949 (Ind. 1985), cert. denied 476 U.S. 1189 (1986).

The crimes of which Wisehart was convicted involved the beating and stabbing of an elderly woman, Marjorie Johnson, in her apartment and the taking of a small amount of money. Wisehart was convicted largely on the strength of a detailed confession which we ruled on direct appeal was properly admitted at trial. Of importance to issues facing us in this appeal is that the confession gave no suggestion that Wisehart had any accomplices in the crimes and that all of the other evidence linking Wisehart to the crimes was circumstantial. We refer the reader to our earlier opinion for additional details of the facts.

Discussion

I

Wisehart's most substantial claim of entitlement to post-conviction relief is grounded in a claim of "newly-discovered evidence." He argues that while he was convicted and sentenced on the theory that he acted alone,

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[1] Ind. Code § 35-42-1-1(2)(1982). Unless otherwise indicated, references to Title 35 of the Indiana Code refer to the version published in the 1982 Edition of the Code which contains the substantive criminal statutes and the death penalty statute in effect at the time the crimes at issue were committed.

[2] Ind. Code § 35-42-5-1.

[3] Ind. Code § 35-43-2-1.

[4] Ind. Code § 35-43-4-2.

[5] Ind. Code § 35-50-2-9.

new evidence presented at his post-conviction hearing shows that he had two accomplices, one of whom was the primary actor in the murder.

In order for newly-discovered evidence to merit relief, the claimant must establish each of the following: (1) that the evidence was not available at trial; (2) that it is material and relevant; (3) that it is not cumulative; (4) that it is not merely impeaching; (5) that it is not privileged or incompetent; (6) that due diligence was used to discover it in time for trial; (7) that the evidence is worthy of credit; (8) that it can be produced upon a retrial of the case; and (9) that it will probably produce a different result. Fox v. State, 568 N.E.2d 1006, 1007 (Ind. 1991).

A

During the post-conviction hearing, there was testimony from one Robert Disney that he, one Tony Fuqua, and Wisehart had set out to burglarize the victim's apartment and when she was unexpectedly found to be home, he saw Wisehart and Fuqua physically attack her and Fuqua (but not Wisehart) stab her several times.

More specifically, Disney testified at the post-conviction hearing that when the threesome entered the victim's apartment, Wisehart grabbed the victim by the arm, spun her around, and put his arm around her neck in a choke hold. Disney testified further that when the victim started to scream, Wisehart said, "[S]omebody shut her up," and Fuqua then punched her in the stomach. (R. at 1386.)[6] Disney continued that the victim then fell to the floor and Wisehart kicked her; that he saw Fuqua but not Wisehart stab her several times; and that after the stabbing, Wisehart directed Fuqua to "get rid of those items" Fuqua used to stab the victim. Disney testified that he himself never touched the

[6] The record is referred to in this opinion in three ways. The record in the post-conviction court is denominated as "R;" the record in the trial court as "T.R.;" and the supplemental record containing the record of jury voir dire at trial as "S.T.R."

victim, that he "just couldn't deal with whatever it was that was going on," and left during the attack.

Officer Moberly, a police detective with major responsibility for investigating the crime, testified at the post-conviction hearing that Wisehart had verified most of the details of a substantially similar account given by Disney in an interview some years after Wisehart's conviction. Moberly also testified that he had come to believe Disney's account.

Also in evidence at the post-conviction hearing was the transcript from Wisehart's trial and police reports related to the investigation of the crimes.[7] This evidence, together with the Disney and Moberly testimony, contains the following additional information relevant to this claim:

1. Prior to his trial, Wisehart confessed to the crimes and accepted sole responsibility for them. He specifically admitted stabbing the victim and did not give any indication but that he had acted alone.

2. Again prior to Wisehart's trial, Fuqua was arrested and charged with assisting a criminal on the basis that he had admitted being outside the apartment while Wisehart was inside committing the crimes.

3. Again prior to trial, Disney was interviewed on several occasions about possible involvement in the crimes. Disney denied involvement and was not considered a suspect.

4. Both Disney and Fuqua were on the State's witness list for trial but neither was called.

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[7] The police reports were admitted "as a business record pursuant to Indiana Rule of Evidence 803(8)." Actually, Evid.R. 803(8) covers public records; Evid.R. 803(6) covers business records. We note that investigative reports by police and other law enforcement personnel are not rendered admissible by Evid.R. 803(8); see Bacher v. State, 686 N.E.2d 791, 794 n. 4 (Ind.1997); except when offered by an accused in a criminal case. Evid.R. 803(8)(a). Wisehart offered the reports here.

5. At trial during the guilt phase, Wisehart presented testimony from Officer Moberly and from another police officer involved in the investigation, both of whom indicated that it was possible that other people were involved in the crime.

6. During the trial but outside the presence of the court, Wisehart was interviewed by the police and told them that he, one Gregory Scott Johnson (no relation to the victim) and a third person had committed the crimes and that it had been Johnson who had stabbed the victim to death.[8] During this session, Wisehart apparently inadvertently once indicated that the third person was Disney.

7. During the penalty phase, Wisehart's counsel attempted to present testimony through Moberly that other people may have been involved in the crime as a mitigating circumstance. However, the trial judge refused to allow such evidence to be presented to the jury[9] and no evidence regarding the possible involvement of others was presented to the jury during the penalty phase. During defense

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[8] This unusual session took place with the active participation of Wisehart's trial counsel. It occurred after Johnson had testified for the State. The unmistakable impression of this session is that Wisehart was trying to get even with Johnson for testifying against him. Wisehart makes no contention now that Johnson was involved in these crimes.

[9] The State objected to the use of this evidence on grounds that it was not relevant to any sentencing issue. In arguing in support of using the evidence, defense counsel said, "[A]s the prosecutor and Officer Moberly both know, ... there are other people involved in this case, as we've told them. Their evidence clearly shows that there [were].... And while true, it has absolutely nothing to do with whether this man is guilty or innocent of the crime of murder as related by the statute, it definitely has something to do with sentencing." (R. at 2336.) The trial court sustained the objection on grounds that the evidence did not rise to the level of a mitigating circumstance under either Ind. Code § 35-50-2-9(c)(4) or (5). Those provisions establish that the sentencer may consider as mitigating circumstances that (1) the defendant was an accomplice in the murder which was committed by another person and in which the defendant's participation was relatively minor or (2) the defendant acted under the substantial domination of another person. The trial court concluded that the mere participation of others in the crimes did not rise to the level required by either mitigator.

counsel's offer to prove in this regard, Officer Moberly indicated that it was now his belief that no one else was involved in the crimes and Dr. Joy, a defense expert witness, testified that Wisehart had told him others were involved. At the sentencing hearing, a defense investigator testified that Wisehart had told the investigator that others were involved in the crime and that Wisehart never struck the victim.[10]

8. After Wisehart was convicted and sentenced, the Anderson Police Department continued investigating the crimes. The record shows that during this investigation, Moberly spoke with Disney who again denied involvement. At the post-conviction hearing, Moberly testified that some months later he again spoke to Disney who changed his story and gave Moberly an account substantially the same as that which Disney presented at the post-conviction hearing. The record contains a statement signed by Disney containing an account substantially the same as that which Disney presented at the post-conviction hearing.[11] Moberly testified that he then visited Wisehart in prison[12] and Wisehart "verified" Disney's account. Disney's account remains essentially unchanged from that point forward. But the

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[10] It appears that this witness was referring to Wisehart's attempt to implicate Johnson, discussed in paragraph 6, supra, and the accompanying footnote.

[11] It appears that this is the account Moberly testified that Wisehart "verified" although the meeting between Moberly and Wisehart appears to have occurred a few days before the date on Disney's statement. We do not find this discrepancy, if it is one, significant.

[12] Before talking with Wisehart, Moberly stated that Mr. Lawler, the prosecutor, was advised of the plan to talk with Wisehart, but was told that the purpose of the interview was to question Wisehart about accomplices and not about Wisehart's guilt or innocence since that had already been determined. Moberly also stated that none of Wisehart's attorneys were contacted before this interview. Wisehart's direct appeal was still pending at this time and Wisehart now argues--without authority-- that the State's duty to disclose exculpatory evidence continues after trial. Wisehart's failure to present any authority on this point is telling but we refrain from holding that the State never has such a duty. It is sufficient to hold that there was no duty here both since the information itself was not exculpatory and it was communicated to Wisehart.

record indicates that several months later, Moberly again visited Wisehart in prison and Wisehart returned to his account that Johnson was his accomplice and that Johnson had done the stabbing.

9. The record contains a police report dated July 31, 1985, in which Moberly wrote that the Madison County prosecutor had decided not to pursue charges against Fuqua because, "although there was enough to sustain a grand jury indictment, he felt that once in trial, there would not be enough for a conviction as the state could only present Robert Disney, and Fuqua probably would testify and it would be down to which witness would be the most credible. It was felt that because of Disney's appearance and background he would not be the most credible." Moberly also wrote: "This case is now suspended: Mark Wisehart is on death row. It is known now that Fuqua and Disney were the other co-conspirators. Fuqua inflicted most of the damage on the victim. Never once have we uncovered any evidence that Wisehart was not involved. Disney will remain to have immunity should he ever testify for the state." (R. at 1256.)

10. As indicated at the outset of this section, Disney and Moberly testified at the post-conviction hearing.

B

Wisehart contends that the evidence that Disney and Fuqua were involved in the crimes and that Fuqua stabbed the victim constitutes "newly discovered evidence," entitling him to have both his convictions and death sentence set aside. The post-conviction court rejected these claims, finding that this evidence was insufficient to entitle Wisehart to relief from either his convictions or his sentence. As discussed at the outset of this part I, Fox sets forth nine stringent requirements, each of which a claimant must satisfy in order to obtain relief on grounds of newly discovered

evidence.[13] Fox, 568 N.E.2d at 1007. We conclude that Wisehart has not satisfied at least three of the Fox requirements. He has not established that the evidence was not available at trial. He has not established that due diligence was used to discover this evidence in time for trial. And he has not established that this evidence would probably produce a different result on re-trial.

B-1

By definition, a claim for relief based on newly discovered evidence must not be based on evidence or information of which the claimant had knowledge prior to trial. See United States v. Calderon, 127 F.3d 1314, 1351 (11th Cir. 1997), cert. denied sub nom Noa v. United States, 118 S.Ct. 1090 (1998). It has long been the rule in this state that "[a] defendant in possession of evidence, who fails to present the evidence at trial, cannot use such evidence as a basis for a new trial following an unfavorable verdict." Fleener v. State, 274 Ind. 473, 479, 412 N.E.2d 778, 782 (1980) (quoting Riddle v. State, 273 Ind. 112, 116-17, 402 N.E.2d 958, 961 (1980)). See Vacendak v. State, 264 Ind. 101, 109, 340 N.E.2d 352, 357 (1976) (citing DeShone v. State, 207 Ind. 380, 386, 193 N.E. 223, 225 (1934)).

What Wisehart claims is "newly discovered" is Disney's account placing Fuqua and Disney in the victim's home with Wisehart at the time the crimes were being committed. Wisehart does not claim that he was not present. As such, to the extent that Wisehart claims that Disney's testimony is accurate, Wisehart knew prior to trial about Fuqua's and Wisehart's relative roles in the crimes because he was there

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[13] The federal courts use similar criteria. See, e.g., Jarrett v. United States, 822 F.2d 1438, 1445 (7th Cir. 1987). Judge Ripple sets forth the rationale for these requirements: "Because of the importance accorded to considerations of repose, regularity of decision-making and conservation of scarce judicial resources, courts exercise 'great caution' in setting aside a verdict reached after fully-conducted proceedings." United States v. Kamel, 965 F.2d 484, 490 (7th Cir. 1992) (footnote citing cases omitted), habeas corpus denied, 1997 WL 639231 (N.D.Ill.1997).

with them. The evidence that Disney and Fuqua were involved in the crimes and that Fuqua stabbed the victim is not newly discovered evidence under Fox because, if it is true, it constitutes evidence or information of which Wisehart had knowledge prior to trial.

B-2

The Fifth Circuit has observed that "newly available" evidence is not necessarily synonymous with "newly discovered" evidence. United States v. Metz, 652 F.2d 478, 480 (5th Cir. 1981). This is particularly the case when a witness comes forward with exculpatory testimony after trial has been completed. As Fox makes clear, evidence is not "newly discovered" if due diligence was not used to discover it in time for trial. Fox, 568 N.E.2d at 1007. We have rejected as not meeting the Fox requirements newly available evidence consisting of post-trial exculpatory testimony from a co-defendant, accomplice or alibi witness where there was no effort made to produce it at trial. See, e.g., James v. State, 613 N.E.2d 15, 25 (Ind. 1993); Bradburn v. State, 425 N.E.2d 144, 146 (Ind. 1981). (James and Bradburn also stand for the proposition discussed in subsection B-1, supra.)

Prior to trial, Fuqua had been arrested and charged with assisting Wisehart. Disney had been interviewed. Both Fuqua and Disney were on the State's witness list for trial. Disney had been identified by Wisehart (in the out of court police interview during trial) as having been involved. And there was evidence and argument during trial that others were involved. The evidence that Disney and Fuqua were involved in the crimes and that Fuqua stabbed the victim is not newly discovered evidence under Fox because, given that Fuqua and Disney had been identified prior to trial but were not called as witnesses, due diligence was not used to discover the evidence.

B-3

Under Fox, newly discovered evidence warrants relief

only if the evidence will probably produce a different result. Fox, 568 N.E.2d at 1007; Bradford v. State, 675 N.E.2d 296, 302 (Ind. 1996), reh'g denied. As to Wisehart's convictions, the only direct evidence at trial of Wisehart's involvement in the crime was his confession. The Disney statement places Wisehart in the apartment, holding the victim in a headlock, and directing Fuqua to silence her. It has Wisehart kicking the victim and directing Fuqua to dispose of the murder weapons. If anything, the Disney testimony would have made Wisehart's conviction of the crimes more likely.

As to the death sentence, our death penalty statute contains several statutory mitigating circumstances that are relevant here. Mitigating circumstances providing that the defendant's participation was relatively minor and that the defendant acted under the substantial domination of another person[14] are in no way established by this evidence. There was nothing in Disney's testimony to suggest that Wisehart's participation was other than major. As to substantial domination, Wisehart's reported orders to Fuqua to silence the victim and to dispose of the murder weapons point in the opposite direction.[15] Another statutory mitigator--the defendant was an accomplice in a murder committed by another person[16]--also is not established by Disney's testimony. One who holds a victim in a choke hold and directs another to silence the victim shares full culpability for the killing even if the other strikes the fatal blow. See Ajabu v. State, No. 71S00-9512-CR-1377, 1998 WL 97849, at *11 (Ind. Mar. 6, 1998); Townsend v. State, 533 N.E.2d 1215, 1227 (Ind. 1989); Resnover v. State, 460 N.E.2d 922, 935 (Ind. 1984), cert. denied 469 U.S. 873 (1984). The kick and the directions on disposing of the weapons reinforce this conclusion.

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[14] Ind. Code § § 35-50-2-9(c)(4) & (5).

[15] This evidence also points in the opposite direction of Wisehart's claim, which we reject, that he is entitled to post-conviction relief because his sentence is disproportionate since he was not the "leading personality" in the commission of the crime.

[16] Ind. Code § 35-50-2-9(c)(4).

The death penalty statute also permits the sentencer to take into account, in addition to the mitigating circumstances specified in the statute, any other circumstances appropriate for consideration. Ind. Code § 35-50-2- 9(c)(7). It is here that Wisehart directs his argument with particular force. He contends that even if he was a principal actor in the murder, he was entitled to have the sentencer take into account testimony to the effect that he was not the only principal actor and that he personally did not stab the victim. Compared to the story presented at trial (Wisehart's own confession), the Disney account does not have Wisehart doing the stabbing[17] but does add the following details: that Wisehart brought two others along to perpetrate the crime, that he held the victim in a choke hold, that he directed another to silence her, that he threw her to the floor and kicked her, and that he directed another to dispose of the weapons used to stab her. We do not find the net effect of the Disney account to reduce Wisehart's involvement to the point that this evidence can be said probably to produce a different result.

II

Wisehart's second most substantial claim of entitlement to post-conviction relief is that he was deprived of the effective assistance of counsel to which he was entitled when his trial counsel pursued contradictory theories of defense. While framed in several different ways, the gist of Wisehart's claim is that it was incompetent and prejudicial for his lawyer to argue at the same time that Wisehart was innocent and that he was insane. Wisehart presses his point with the following arguments. First, the jury simply could not accept Wisehart's lawyer's argument that Wisehart did not commit the crime when an insanity defense suggests that a defendant committed the crime but was not responsible for his actions. Second, the jury's ability to assign mitigating

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[17] Actually, the Disney account does not exonerate Wisehart of any stabbing. It only reports that Disney did not see Wisehart do any stabbing before Disney left--which Disney testified was during the attack, i.e., before the attack was over.

weight to Wisehart's mental condition was significantly undermined (if not logically excluded) by his lawyer's contention that he had not committed the crime. Third, any hope that Wisehart's lawyer had to make strategic use of the two defenses was undermined by counsel's alleged failure to explain the reasons for the apparent contradictions and by counsel's alleged failure to advance Wisehart's mental condition as a mitigating circumstance.

Indiana analyzes claims of ineffective assistance of counsel according to the two-part test announced in Strickland v. Washington, 466 U.S. 668 (1984). See, e.g., Lowery v. State, 640 N.E.2d 1031, 1041 (Ind. 1994). First, we require the defendant or petitioner to show that, in light of all the circumstances, the identified acts or omissions of counsel were outside the wide range of professionally competent assistance. Id. This showing is made by demonstrating that counsel's performance was unreasonable under prevailing professional norms. Id. (citing Turner v. State, 580 N.E.2d 665, 668 (Ind. 1991)). Second, we require the defendant or petitioner to show adverse prejudice as a result of the deficient performance. This showing is made by demonstrating that counsel's performance was so prejudicial that it deprived the defendant or petitioner of a fair trial. Lowery, 640 N.E.2d at 1041. We will conclude that a fair trial has been denied when the conviction or sentence has resulted from a breakdown of the adversarial process that rendered the result unreliable. Id. (citing Best v. State, 566 N.E.2d 1027, 1031 (Ind. 1991)). See also Sanchez v. State, 675 N.E.2d 306, 310 (Ind. 1996).

A

We have never examined whether the simultaneous presentation of innocence and insanity defenses constitutes ineffective assistance of counsel nor does there appear to be

other authority precisely on this point.[18] However, several lines of cases give us some guidance.

For example, appellants seeking relief from criminal sanctions often contend that their lawyers at trial were ineffective for failing to raise defenses related to their mental condition. Courts—including ours—have rejected these claims of ineffective assistance of counsel by observing that such defenses likely would have been counter-productive because they would conflict with the proffered defense of actual innocence.[19] See Bieghler v. State, No. 34S00-9207-PD-583, 1997 WL 778978, at *15 n. 10 (Ind. Dec. 18, 1997); Meredith v. State, 679 N.E.2d 1309, 1312 (Ind. 1997). See also Weeks v. Jones, 26 F.3d 1030, 1039 (11th Cir. 1994); Rose v. State, 617 So.2d 291, 294 (Fla. 1993); State v. Garrett, 386 S.E.2d 823, 830 (W.Va. 1989); Commonwealth v. Mizell, 425 A.2d 424, 426 (Pa. 1981).

Another type of situation involving a conflict between the defenses of innocence and insanity caused the court to grant relief in Selsor v. Kaiser, 81 F.3d 1492 (10th Cir. 1996). Selsor and Dodson were charged with murder. Selsor's defense was that he was innocent; Dodson's defense

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[18] In a different context, we have suggested that, under certain circumstances, the simultaneous submission of conflicting defense theories could constitute ineffective assistance of trial counsel. See Shackelford v. State, 486 N.E.2d 1014, 1017 (Ind. 1986) (holding trial counsel not ineffective for offering arguably inconsistent defense theories of self-defense and intoxication).

[19] In Shackelford, 486 N.E.2d at 1016, we said:

> This Court has previously noted the difficulties that may inhere at trial when inconsistent or alternative defenses are presented by the criminal defendant. Hester v. State, 262 Ind. 284, 315 N.E.2d 351 (1974). This issue has generally arisen when trial counsel has presented one defense and appellant claims that another defense should have been presented. In such situations, this Court has found that the appellant was effectively represented by trial counsel when assertion of the defense which had been omitted at trial would have been inconsistent and contradictory to the appellant's own trial testimony. Cates v. State, 468 N.E.2d 522 (Ind.1984); Kemp v. State, 446 N.E.2d 1306 (Ind.1983).

was that he was insane. The state public defender was appointed counsel for both men. The trial court denied Selsor's motion that the defendants be tried separately, calling the joint representation problem "an internal problem for the Public Defender's office." The federal appeals court granted Selsor's petition for habeas corpus relief, finding that the trial court had failed to discharge its constitutional duty to "take adequate steps to ascertain whether the risk [of conflict] was too remote to warrant separate counsel." Id. at 1503 (quoting Holloway v. Arkansas, 435 U.S. 475, 484 (1978)). In explaining its conclusion, the appeals court said:

> There was no inquiry into how Selsor's defense might be adversely affected by the joint representation even though the potential conflict of interest was patent. As defense counsel noted, Dodson would assert an insanity defense which required him to admit his role in the offenses, including his participation with Selsor. Selsor's defense was to deny any involvement. These inconsistent positions could color the judgment of the defense attorneys throughout the trial. An adequate consideration of the conflict would have revealed the impossibility of going forward with the joint representation.

Selsor, 81 F.3d at 1502-03 (footnote omitted).

We believe a third set of cases are most relevant to the problem here. Because of the difficulties inherent in conducting trials where defenses of innocence and insanity are both available, some jurisdictions, either by case law or statute, require or permit bifurcated trials on the issues of innocence and insanity. See generally Debra T. Landis, Annotation, Necessity or Propriety of Bifurcated Criminal Trial on Issue of Insanity Defense, 1 A.L.R.4th 884 (1980). A claim of entitlement to such a proceeding was made to this court in Hester v. State, 262 Ind. 284, 286, 315 N.E.2d 351, 352 (1974). While noting that Ind.Trial Rule 42(B) and (C) would authorize a bifurcated trial upon such issues, our

Court also identified certain problems arising in such cases. In particular, we reviewed an Arizona decision declaring unconstitutional that state's statute requiring a bifurcated trial where a plea of not guilty by reason of insanity was asserted:

> Looking to the procedural difficulty in administering bifurcated trials, the Arizona court noted that the trial court could not consider the evidence of insanity at the first trial and would thus be required to find intent solely from the circumstances connected with the offense. ' * * * The first trial then would involve only proof that an act of a criminal nature had been committed, and that the defendant committed it. In effect, this gives rise to a presumption of intent, premeditation, or malice which runs counter to the common law and constitutional concepts of criminal law. The second trial is limited solely to the question of legal insanity, the guilt of the defendant having already been determined. There is no provision, nor realistically could there be, to determine also intent, premeditation, or malice in reduction of the degree of the crime. Thus, the presumption raised in the first trial becomes an irrebuttable presumption. Such a presumption is in violation of due process, * * *.' [State v. Shaw,] 471 P.2d [715,] 724 [(Ariz. 1970)].
>
> We hold that although a plea of insanity may be viewed as an admission of the commission of the criminal act and may in other ways ease the State's burden of proof, it does not, in the absence of other compelling circumstances, entitle a defendant to a bifurcated trial. We do not view the defendant's alleged reason for requesting the two-stage trial as a circumstance giving rise to probable and substantial prejudice such as required a variance from the established and normal single trial procedure.

Hester, 262 Ind. at 287-88, 315 N.E.2d at 353. Many jurisdictions have reached the same result. See State v.

Hightower, 661 A.2d 948, 953 (R.I. 1995); Commonwealth v. Jermyn, 533 A.2d 74, 82 (Pa. 1987); State v. Ward, 272 S.E.2d 84, 87 (N.C. 1980); Leick v. State, 281 P.2d 806, 811 (Col. 1955). Contra, Holmes v. United States, 363 F.2d 281, 284 (D.C.Cir. 1966).

At bottom, we conclude from these lines of cases that in the absence of other compelling circumstances, a criminal defendant is not subjected "to probable and substantial prejudice" when counsel does maintain both defenses.

B

We find that there was a sound strategic reason for placing Wisehart's mental condition at issue in this case. Counsel was not maintaining that Wisehart was not guilty by reason of insanity but rather asserting insanity as an explanation for the most damaging evidence the State had against Wisehart's defense of innocence--Wisehart's confession. Wisehart's mental condition--his propensity for blame-taking--might explain how he could be innocent and yet confess. While counsel certainly suffered through several rough spots in employing this strategy, especially during voir dire and the examination of Dr. Joy, counsel's closing argument clearly, cogently and effectively employed Wisehart's mental condition to support his innocence defense.

B-1

During closing argument, trial counsel provided a detailed discussion of how the State's circumstantial evidence did not prove that Wisehart had committed any of the crimes. Counsel then argued that the State's case rested solely on Wisehart's confession --and that confession was false, a product of Wisehart's mental illness:

> There are a lot of problems with this case. What happened here was after [Wisehart] confessed, [the State] said, oh, boy, we got somebody to confess.

> We don't have to go any farther. That's true. They didn't really go any farther according to their evidence. They said they had the guy that did it. They didn't even really consider [Wisehart's] mental condition as any kind of a factor bearing on why he would say something if he didn't mean it. And that's the reason why the insanity defense is in front of you. We're not trying to excuse what he did, because he didn't do it. What we're trying to explain to you is why he said what he did. And there's ample evidence to show why he made these ridiculous, self-destructive comments about himself and implicated himself in a crime he didn't do....

(T.R. at 2276.) Trial counsel then proceeded to repeat various testimony tending to support such theory and then also discussed Wisehart's blame-taking character with the following comments:

> And then last ... the acceptance of blame. Now is there a history of that in [Wisehart]? Yes, there is. How do we know there's a history of acceptance of blame in [Wisehart]? [Wisehart], in junior high school, according to Mr. Warmke ... remember him, the dean of boys? ... said he saw [Wisehart] several times. [Wisehart] would always admit to whatever he accused him of doing, whether he had done it or not. He said that. He said he knew for a fact that lots of times kids would put him up to things. But [Wisehart] wanted to be so accepted, he wanted so much to be a part of the group that he would sit there and take the blame for everybody, whether he did it or not. That's one example, and Mr. Warmke said that wasn't just one time. He remembered several instances of that. Then we go on to his behavior at Cross Roads.... While he was there, he exhibited that same behavior. He'd take the blame for the other kids, the kids he was close to. Somebody'd get in trouble, he'd say, I did it. Punish me for it. I'm the one who did it. So we have a history of this sort of

behavior on his part.

(T.R. at 2283-84.)

Trial counsel informed the jury that the defense of insanity was not filed in order to provide an excuse for Wisehart, but instead was filed in order to provide proof that Wisehart falsely confessed to a crime he did not commit. We find such an approach well within the bounds of effective defense strategy.

B-2

Our determination that there was a more than adequate strategic explanation for counsel's decision to argue both actual innocence and insanity to the jury makes it unnecessary to examine in great detail Wisehart's numerous specific claims of ineffective assistance of trial counsel related to this issue. However, we do elect to address several of them.

First, Wisehart contends that, while it may have been sound strategy to argue that Wisehart had falsely confessed due to his mental condition, the law did not require counsel to file a notice of insanity or argue that his client was insane.[20] By doing so, Wisehart maintains, counsel's performance was deficient (because he did not know insanity defense law) and prejudicial (because the jury had to deal with an inappropriately presented insanity claim). We might today conclude that a defendant would not have to file a notice of insanity and pursue an insanity defense in order to

[20] At the time of the crimes at issue, the legislature defined insanity as the lack of substantial capacity either to appreciate the wrongfulness of the conduct or to conform conduct to the requirements of the law as a result of a mental disease or defect. Ind. Code § 35-41-3-6(a) (1982). Mental disease or defect was not defined except to exclude any "abnormality manifested only by repeated unlawful or antisocial conduct." Ind. Code § 35-41-3-6(b) (1982). In general, our insanity defense statute then required that for a defendant to interpose a defense of insanity, a notice of insanity had to be filed in advance of trial. Ind. Code § 35-36-2-1 et seq. (1982).

claim that he had falsely confessed due to mental illness. But this has been an unsettled area of Indiana law, at least until very recently. See McLain v. State, 678 N.E.2d 104, 105, 109 (Ind. 1997) (holding that a notice of insanity was not required to contest the voluntariness of defendant's actions), reh'g denied.; Barrett v. State, 675 N.E.2d 1112, 1117 (Ind. Ct. App. 1996) (in holding that evidence of battered woman's syndrome was admissible to negate defendant's mental state, the court did not suggest that a notice of insanity need be filed to present such evidence), trans. denied. Given then-existing statutory and case law, defense counsel could well have expected vigorous resistance to any effort to place Wisehart's alleged mental illness before the jury without complying with the notice of insanity statute. See Badgley v. State, 226 Ind. 665, 676, 82 N.E.2d 841, 845 (1948); Taylor v. State, 181 Ind.App. 392, 394 n. 2, 391 N.E.2d 1182, 1183 n. 2 (1979). It was not deficient performance to proceed under the insanity notice statute.

Second, Wisehart contends that trial counsel was ineffective for having confused the jury during voir dire by not articulating how Wisehart could maintain claims of actual innocence and insanity at the same time. During voir dire, a number of jurors frankly questioned how a defendant could claim both. For example, prospective juror Boyland indicated that he felt it was "kind of contradictory" for a defendant to maintain both insanity and actual innocence; that if he were to assert an insanity defense, "my firsthand thoughts would be that I would be admitting to the crime ... any crime." (S.T.R. at 576; 577.) While there was undeniably some confusion on this score, we find that the issue was fully aired and that trial counsel took steps to exclude prospective jurors who expressed unwillingness to

entertain the dual arguments.[21] We do not find that counsel's performance on this issue during voir dire was deficient.

Third, Wisehart faults trial counsel's opening argument. Trial counsel's opening statement was brief and direct. The opening argument simply stated that Wisehart was innocent and that the evidence would not show beyond a reasonable doubt that Wisehart committed the crime. Trial counsel made no reference to the insanity plea or the false confession theory. While in retrospect, it may appear that this would have been a good time to inform the jury of such theory, it would also have been logical for counsel to wait for the State to introduce the confession into evidence before attacking it.

In any event, we have regularly held that the decision not to make an opening statement is a matter of trial strategy and will not support an ineffective assistance of counsel claim. See, e.g., Roche v. State, No. 45S00-9305-PD-588, 1997 WL 796189, at *7 (Ind. Dec. 31, 1997); Douglas v. State, 663 N.E.2d 1153, 1155 (Ind. 1996) (citing Nuckles v. State, 560 N.E.2d 660, 662 (Ind. 1990)); Miller v. State, 541 N.E.2d 260, 263 (Ind. 1989). Likewise, we hold that the content of an opening statement, absent some egregious blunder, is also a matter of strategy.

Lastly, Wisehart claims that counsel was ineffective in failing to present sufficient evidence to support the false confession claim. We note that the argument here is not that counsel failed to present any evidence in this regard but only that counsel failed to present enough evidence. The following evidence was presented:

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[21] In his brief, Wisehart presents five prospective jurors' comments to demonstrate their unwillingness to accept the dual argument strategy. But four of these individuals were struck from the venire and did not serve. (Graham, S.T.R. at 199; Bruns and Fewell, S.T.R. at 350; Davidson, S.T.R. at 584.) Juror Boyland, whose comments are discussed in the text, supra, and also in part X-D, infra, was seated but only after having been challenged for cause. (S.T.R. at 577.) We acknowledge that trial counsel did not exercise a peremptory challenge with respect to Boyland but find that within the range of counsel's discretion.

1. The house parents at Crossroads, a home for emotionally disturbed children where Wisehart had resided, offered the following testimony:

> Well, [Wisehart] has always kinda the defender of the underdog, I would say. We had several little kids that would do mischievous things, and [Wisehart] ... and one little fellow in particular that [Wisehart] was just very, very fond of ... and he would ... if James got in any trouble and [Wisehart] would come and say, "Well, Mom, I was with him. I could've ... I should've stopped him. It was partly my fault. I should've stepped in," or something. But ... and he did that on several different occasions where three or four kids would get together and they'd pull some mischievous prank and [Wisehart] would take the blame for it. "It was my idea. It was my idea." I'm not sure it always was, but that's what he would tell me. (T.R. at 1702.)

> I consider it kind of unselfish when he would give up some of his own free time to be given punishment for something that someone else really did. Especially the little guy. I keep referring to these littler kids. He was very protective over them. If they had done something and he didn't feel that they should get the punishment ... I don't know ... he would just say he did it, you know. (T.R. at 1762)

2. The dean of a school that Wisehart had attended testified that Wisehart would accept any form of discipline exercised by him even on the occasions when other children put him up to do some of the things. (T.R. at 1961.)

3. Dr. Joy, the defense's psychologist, testified that "[Wisehart] fabricates a lot of things.... I don't know that I could say specifically as to a confession, but he fabricates a lot of things and tells very elaborate stories that are not true." (T.R. at 1886.)

We find that trial counsel was not deficient in failing to present sufficient evidence in support of his false confession theory.

C

Wisehart advances a second claim concerning ineffective assistance of trial counsel with respect to his mental condition. He contends that it constituted deficient and prejudicial performance for counsel not to have presented evidence of Wisehart's mental condition as a mitigating circumstance during the penalty phase of the trial. Advanced as part of this claim is the assertion that trial counsel erroneously thought that having been unsuccessful in advancing his mental condition arguments in the guilt phase, they were no longer available in the penalty phase.

At the penalty phase, all evidence from the guilt phase was incorporated by reference. In his closing argument, the prosecutor contended that by its guilt phase verdicts, the jury had rejected Wisehart's mental condition as a mitigating circumstance. In response, Wisehart's trial counsel pointed to the guilt phase evidence of Wisehart's mental condition arguing vigorously that it should be considered as a mitigating circumstance (emphasis added):

> Each and every one of you people are going to have to make an individual choice of whether you can intentionally recommend someone die, and then we will be passing the burden on to Judge Newman and it will be his final choice to make the decision about whether Mark lives or dies. It's a very, very weighty decision we have here. We're talking about sitting down and thinking through whether we're going to kill someone, much the same as the State has been accusing Mark of doing. Did Mark sit down and rationally think through what he did in this case? Consider the evidence. Mark has a long, long history of mental disturbance. There's no doubt about that. Now, the prosecutor says, well, that's not a

> mitigating factor. It is definitely a mitigating factor. Mark was born, raised in a family, consumed by all sorts of problems around him. He is a factor, not only of his genes, but his environment. Somewhere along the line, something short-circuited in this boy. Are we to condemn him because he is a freak of nature? Are we to condemn him because there's something missing in his character that ought to be there? That there [is] something wrong with his brain? [sic]

(T.R. at 2409-10.) Later in his argument, trial counsel returned to this theme (emphasis added):

> [The prosecutor says there are] no mitigating circumstances here. Remember all the evidence we had. We had witness after witness after witness for both the prosecution and the State who testified about Mark's mental problems. Every last one of them did. Now, admittedly, you rejected it as a possible mitigating factor on his responsibility for the crime, but the law allows you to consider that as to whether the sentence is proper. And for those of you who do not feel that your Christian beliefs are strong enough to consider that, consider the other. Consider whether Marks' mental condition was such that he did not commit this crime ... or that he should not be executed because of this crime. And I think if you ... if you look at all those factors, there's only one conclusion you can reach, that it is not proper to impose the death penalty in this case.

(T.R. at 1871-72 (ellipses in original).) We conclude that trial counsel's performance at the penalty phase was not deficient for failing to place Wisehart's mental condition before the jury as a mitigating circumstance.

III

In addition to the claims of ineffective assistance of trial

counsel related to the insanity-actual innocence defenses discussed in part II, supra, Wisehart lodges numerous additional complaints about trial counsel's guilt phase performance that he contends denied him the effective assistance of counsel. The post-conviction court found that Wisehart was not denied the effective assistance of counsel and we agree.

A

As a general matter, Wisehart contends that trial counsel's lack of experience in defending a death penalty case and presenting an insanity defense was prejudicial to the defendant. Inexperience per se is not sufficient to make out a claim of ineffective assistance of counsel. See Meredith, 679 N.E.2d at 1312 (quoting Douglas, 663 N.E.2d at 1154) ("isolated poor strategy, inexperience, or bad tactics do not necessarily constitute ineffective assistance of counsel"). See also United States v. Cronic, 466 U.S. 648 (1984) (Supreme Court reversed a finding of ineffective assistance of counsel in a case where a young real estate lawyer who had never participated in a jury trial was appointed to represent a defendant charged with mail fraud). Here the post-conviction court found that lead counsel at trial had defended at least thirty-six felony cases, including murder and attempted murder cases, represented persons in involuntary mental health commitment proceedings, handled approximately ten criminal appeals, and attended a seminar on defending death penalty cases. The post-conviction court found that lead counsel had adequate training and experience to defend Wisehart. The post-conviction court found that co-counsel had defended only one felony case and had no experience or training in defending death penalty cases but that this lack of experience did not prejudice Wisehart's defense. We find no inherent ineffectiveness in trial counsel's experience or lack thereof.

B

Defendant contends that trial counsel was ineffective

during pre-trial proceedings for the following reasons: (1) failing to make several motions; (2) failing to raise the issue of Wisehart's competency; and (3) being confused about the mental health issues.

B-1

Wisehart contends that trial counsel: (1) failed to articulate adequately his need for expert assistance; (2) waited until less than three weeks before trial to file a motion to suppress Wisehart's confession; (3) failed to assert in the motion to suppress that Wisehart was impermissibly coerced to confess and that he falsely confessed; and (4) failed to request a continuance after the motion to suppress was denied.

First, Wisehart raised the denial of his motion for a private sociologist as error in his direct appeal, but we found none. Wisehart, 484 N.E.2d at 954. The issue is not available for relitigation here.

Second, he makes no showing of how waiting until three weeks before trial to file this motion (which we held on direct appeal to have been properly denied, Wisehart, 484 N.E.2d at 954) was either deficient or prejudicial.

Third, he alleges that trial counsel failed to assert that Wisehart was impermissibly coerced into confessing. Contrary to Wisehart's contention, we find that trial counsel made the following argument in support of what he styled a "Motion to Suppress the Involuntary Confession": "The statements sought to be suppressed were obtained as a result of psychological and mental coercion illegally directed against [Wisehart]." Moreover, during the hearing on this motion, trial counsel presented testimony of the psychiatrist which corroborated the defense theory that Wisehart was coerced into confessing. And while Wisehart alleges that counsel did not claim in the motion to suppress that Wisehart had confessed falsely or question the psychiatrists regarding the possibility of a false confession, counsel certainly elicited

testimony regarding Wisehart's susceptibility to being easily influenced by others, suggesting that the confession was involuntary. We do not find counsel's performance to be deficient.

Fourth, he suggests that trial counsel should have requested a continuance after the motion to suppress was denied. We do not find counsel's failure to request a continuance to be deficient. In fact, we see no reason why a continuance would have been necessary since counsel (based upon his performance during the suppression hearing) appeared to be prepared to present a false confession theory at trial if the confession was not suppressed.

B-2

Wisehart next contends that trial counsel was ineffective for failing to contest the issue of Wisehart's competence. At Wisehart's competency hearing, Wisehart's counsel stipulated as to Wisehart's competence to stand trial and advised the court that all the psychiatrists' reports indicated (and Wisehart himself believed) that Wisehart was competent to stand trial. The court accepted the stipulation and asked that the record show that all the psychiatrists who examined Wisehart reported that Wisehart was competent to stand trial.[22]

During the post-conviction hearing, Wisehart argued that circumstances indicated that he had not been competent, that trial counsel should not have stipulated to competency, and that trial counsel should have raised the issue of competency again when such circumstances became apparent. Wisehart presented two witnesses to support this argument. First, Wisehart's trial counsel testified during the post-conviction hearing that Wisehart was "not really" able to assist him in

[22] While the reports filed by the three court-appointed psychiatrists are not in the record, the report filed by Dr. Joy (a psychologist who served as an expert witness for Wisehart) stated that "[Wisehart] is competent to assist his attorney in his defense and to understand the charges against him." (T.R. at 95.)

the defense, nor was Wisehart able to understand the seriousness of the proceedings "because of his mental problems."[23] (R. at 551; 562.) Second, Wisehart presented testimony of Dr. Ryan, a clinical psychologist, who met and interviewed Wisehart in April, 1993 (ten years after Wisehart had been convicted and sentenced). Based upon an hour clinical interview and four hours of psychological testing, Dr. Ryan concluded that his best educated guess was that "[Wisehart] was still unable to function effectively, which would severely, ..., would severely interfere with his ability to help or even participate in [Wisehart's] own defense." (R. at 2008.)

"The standard for deciding such competency is whether or not the defendant currently possesses the ability to consult rationally with counsel and factually comprehend the proceedings against him or her." Brewer v. State, 646 N.E.2d 1382, 1384 (Ind. 1995) (citing Mato v. State, 429 N.E.2d 945, 946 (Ind. 1982)). The pre-trial stipulation of trial counsel and the trial court's determination of competence were both based upon the conclusions of the three court-appointed psychiatrists. In conflict is the equivocal post-conviction statement of trial counsel and the testimony of Dr. Ryan, defendant's own expert, based on an examination conducted ten years after the time of trial. Under these circumstances, the findings of the three psychiatrists are sufficient to support the conclusion that counsel's stipulation did not constitute deficient performance.

B-3

Wisehart claims that trial counsel in his confusion hired a psychologist, rather than a psychiatrist. However, the record reflects that trial counsel deliberately requested Dr. Joy (a psychologist) as the expert witness. We will not second-

[23] When trial counsel was asked why he stipulated to Wisehart's competence, trial counsel said that he felt Wisehart was probably competent, but didn't think Wisehart could conform his conduct to the standards of society.

guess' counsel's strategic decision, especially without a showing of prejudice.

C

Wisehart asserts that the following actions during voir dire constitute ineffective assistance of counsel: (1) failing to provide the jury with an articulable defense theory; (2) failing to discover the jury's receptiveness to the penalty phase theory; and (3) failing to strike at least two jurors.

First, Wisehart contends that trial counsel was ineffective during voir dire for failing to provide the jury a cogent defense theory. Our review of the record indicates otherwise. Trial counsel adequately informed the jury of the defense theory that Wisehart was innocent, that Wisehart pled "not guilty" and that a notice of insanity was filed in order to introduce evidence regarding Wisehart's mental condition. See part II, supra. Additionally, Wisehart argues that trial counsel was ineffective during voir dire because he did not introduce to the jury the substantive factual issues of the case. This does not constitute deficient performance. See Bannowsky v. State, 677 N.E.2d 1032, 1034 (Ind. 1997) (quoting Von Almen v. State, 496 N.E.2d 55, 59 (Ind. 1986)) ("Questions which seek to shape a favorable jury by deliberate exposure to the substantive issues in the case are improper."); Hopkins v. State, 429 N.E.2d 631, 635 (Ind. 1981) (disapproving use of "voir dire to implant in jurors' minds ideas about the substantive facts of the case being tried").[24]

Second, Wisehart contends that trial counsel failed to discover the jury's receptiveness to the penalty phase theory by not preparing them for any evidence to be offered at trial. We have held that it is permissible to use voir dire to "inquire into jurors' biases or tendencies to believe or

[24] See also McCormick v. State, 437 N.E.2d 993, 996 (Ind. 1982); Everly v. State, 271 Ind. 687, 689, 395 N.E.2d 254, 255 (1979); Blackburn v. State, 271 Ind. 139, 142, 390 N.E.2d 653, 656 (1979).

disbelieve certain things about the nature of the crime itself or about the particular line of defense." Hopkins, 429 N.E.2d at 635. See Bannowsky, 677 N.E.2d at 1034 (quoting Von Almen, 496 N.E.2d at 59) ("jurors are to be examined to eliminate bias but not to condition them to be receptive to the questioner's position."). Our review of the record suggests that trial counsel on several occasions questioned the jurors regarding their opinions on (1) the death penalty, (2) the circumstances in which the death penalty would be justified, (3) whether they could consider mitigating factors to prevent the imposition of the death penalty, and (4) whether insanity was a mitigating factor. To the extent counsel had a duty to discover the jury's receptiveness to the penalty phase theory, we are satisfied that these questions provided a reasonable basis for doing so.

Finally, Wisehart claims that trial counsel was ineffective for failing to strike at least two jurors. Our review of the record indicates that during voir dire, trial counsel challenged several jurors who (1) were strongly in favor of the death penalty under all circumstances; or (2) had a difficult time accepting psychiatric testimony; or (3) expressed concern over accepting the two alternative defense theories. While we agree that trial counsel could have probed some of the jurors in more depth to discover their ability to be fair and impartial jurors, we do not find such failure to be deficient performance. See May v. State, 502 N.E.2d 96, 103 (Ind.1986) (declining to find ineffective assistance of counsel when defendant simply stated that "[c]ounsel could have found a more favorably composed jury without stating any support for this contention, or for his allegation that this jury was unfairly composed"). See also Taylor v. State, 480 N.E.2d 924, 926 (Ind. 1985) (court stated that the decision of whether to strike panel members from the jury was a "judgment call on strategy that does not amount to ineffective assistance of counsel.").

D

Wisehart contends that counsel was ineffective at trial for

failing to (1) impeach a State's witness, (2) object to hearsay testimony, (3) object to the admission into evidence of mugshots, (4) object to testimony referring to a polygraph test, and (5) object to lay witness testimony on insanity.

D-1

Wisehart asserts that trial counsel should have impeached Officer Fancher, a police officer involved in investigating the crimes, with Fancher's prior inconsistent statements in order to undermine the officer's credibility. At trial, Fancher testified that Wisehart had confessed that "[the victim] wouldn't let [Wisehart] in and [Wisehart] had to kill her" (T.R. at 1279). However, at the suppression hearing Fancher testified that Wisehart had stated "I didn't mean to kill her" (T.R. at 604, 608.) While the two statements are somewhat different, they are by no means inconsistent with one another such that impeachment would have been beneficial. In fact, impeachment of Fancher under these circumstances would in no way have undermined his credibility. Instead, impeachment would have provided the jury with an additional incriminating statement, thereby elevating the potential (to Wisehart's detriment) for the jury to believe Wisehart's confession. The decision not to impeach was not deficient performance.

D-2

Wisehart next contends that trial counsel should have objected to the testimony of Detective Tracy when he testified that one of the victim's neighbors recognized Wisehart from a photo array as being present at the apartment building a few days before the crime. Wisehart argues that trial counsel should have objected on the grounds of hearsay. Hearsay is an out of court statement offered for the truth of the matter asserted. Ind.Evidence Rule 801(c). The State suggests that the testimony was offered for its inferential value of demonstrating that Wisehart was present in the apartment building on the day of the crime. Br. of Appellee at 16. If in fact this was the reason for eliciting this

testimony, then it would have been inadmissible hearsay because it would have been offered for the truth of the matter asserted.

Wisehart points us to our decision in Williams v. State, 544 N.E.2d 161 (Ind. 1989). In that case, a detective testified (apparently over objection) that, based on information he received from an unidentified informant, he included defendant's photo in a p..oto array to show to the victim. We found that such testimony "provided the jury with a basis for making inferences that the informant had knowledge that [defendant] committed the offense" without the defendant having an opportunity to test these inferences through cross-examination. Williams, 544 N.E.2d at 163. We reversed Williams's conviction.

In Williams, the declarant of the hearsay statement was anonymous. In this case, the declarant was known. Counsel may have concluded that Wisehart was better off if the declarant was not called to testify. After all, the State might have called her had he objected and the objection been sustained. (In fact, the State did not call the declarant.) The decision not to object was not deficient performance.

D-3

Wisehart also contends that trial counsel should have objected to the photo array on the grounds that a mug-shot was prejudicial. "Mug shots are not per se inadmissible." Andrews v. State, 536 N.E.2d 507, 509 (Ind. 1989). They are admissible if (1) they are not unduly prejudicial and (2) they have substantial independent probative value. Cason v. State, 672 N.E.2d 74, 75 (Ind. 1996) (citing Splunge v. State, 641 N.E.2d 628, 632 (Ind. 1994)); Andrews, 536 N.E.2d at 509. The State properly argues that Wisehart has failed to show that the photo array was a "mug shot" and that nothing in the record indicates that the photo array was ever referred to or characterized as a "mug shot." Furthermore, post-conviction counsel has failed to provide us with the photo array for review. Thus, we have no basis for finding

deficient performance in trial counsel's failure to object to the admission of the photo array into evidence.

D-4

A key State witness at trial was Gregory Scott Johnson. During defense counsel's direct examination of Johnson's mother, Alice Newman, she remarked on her son having taken a polygraph test.[25] Wisehart argues that this created an inference that Johnson passed the polygraph exam, thereby bolstering Johnson's testimony. Wisehart further contends that it was deficient performance for trial counsel to have "elicited" this testimony from Newman. But as the dialog set forth in note 25, supra, indicates, Newman volunteered the information on the polygraph when answering an entirely unrelated question. As such, counsel's performance in this regard was not deficient (nor was his likely strategic decision not to seek a jury admonishment in order to avoid bringing attention to the remark, especially since the results of the exam were never disclosed).

D-5

Wisehart contends that trial counsel should have objected when the State questioned several lay witnesses regarding Wisehart's ability to know the difference between right and wrong. He makes only a conclusory statement to the effect that such an objection would have been sustained. Consequently, he waives appellate review of this contention. Ind.Appellate Rule 8.3(A)(7). See Canaan v. State, 683 N.E.2d 227, 232 (Ind. 1997), reh'g denied; Clemens v. State, 610 N.E.2d 236, 244 (Ind. 1993) (appellate review waived where defendant failed to cite authority and failed to mention

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[25] During direct examination of Alice Newman, after she stated that she saw Wisehart reading the newspaper article regarding the victim's murder, trial counsel asked her whether she gave all of this information to any police officers and she responded in the following manner:

> A: When my son took a polygraph test, I did say that [Wisehart] had been to the house on that Wednesday to some officer at the police station. (T.R. at 2065.)

why counsel's failure to object was substandard performance or how he was prejudiced).

E

Wisehart claims that trial counsel was ineffective in closing argument because he improperly vouched for Wisehart's innocence and then inadvertently requested that the jury not put Wisehart in a position where his life would be taken "for something he probably didn't do." Our review of the record reveals that counsel was doing nothing more than zealously advocating his client's innocence. While counsel's phraseology might not have been the best, the thrust of his argument was clear and did not constitute deficient performance.

IV

In addition to the claims of ineffective assistance of trial counsel discussed in parts II and III, supra, Wisehart also contends that counsel was ineffective for failing to provide mitigating evidence during the penalty phase of the trial. Defense counsel did not present additional evidence during the penalty phase. However, the approach taken by counsel to the penalty phase makes clear that his performance was not deficient.

Our opinion on direct appeal and our review of the record both indicate that trial counsel intended to pursue three lines of argument as to why the death penalty was inappropriate. First, relying on the evidence presented during the guilt phase, counsel planned to argue that death was inappropriate because of Wisehart's long history of mental problems. Second, relying on a criminologist and clergyman, counsel planned to argue that death was inappropriate because it was not a deterrent to crime and was the subject of religious opposition. Third, relying on the defense's psychologist and a police officer involved in the case, counsel planned to argue that death was inappropriate because other persons were involved in committing the

crime.

As discussed in our opinion on direct appeal, the court did not permit counsel to call any witnesses in support of the second or third arguments. Counsel cannot be faulted for failing to present evidence on those two points. As to counsel's first argument, trial counsel presented testimony of multiple witnesses during the guilt phase as to Wisehart's history of mental problems in particular and difficult upbringing and history in general. This evidence admitted during the guilt phase was incorporated into the penalty phase for the jury's consideration. The trial court instructed the jury to consider all the evidence introduced at the trial stage together with new evidence presented during the penalty phase.

As discussed at length in part II-C, supra, trial counsel emphasized this mitigating evidence in his closing argument to the jury during the penalty phase. We agree with the post-conviction court's findings that the presentation of additional witnesses at the penalty phase on the issue of Wisehart's mental condition would have been cumulative. Under the circumstances of this case, when mitigating evidence has already been presented, the failure of counsel to duplicate during the penalty phase the mitigating evidence presented to the jury during the guilt phase does not constitute deficient performance. See Schiro v. State, 533 N.E.2d 1201, 1206 (Ind. 1989) (no ineffective assistance of counsel where, because an insanity defense was raised, the defendant was able to present evidence, typically considered mitigating, during the guilt phase without reintroducing the same evidence during the penalty phase).[26]

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[26] See also Waters v. Thomas, 46 F.3d 1506, 1512 (11th Cir. 1995) (court determined that (1) as a result of an insanity defense, counsel presented a substantial amount of mental illness mitigating evidence and "were not required to subject defense witnesses to another round of cross-examination [ ] nor were counsel required to present redundant evidence" and (2) which witnesses to call is the "epitome of a strategic decision"); Brecheen v. Reynolds, 41 F.3d 1343, 1361 n. 13 (10th Cir. 1994)

V

In addition to the claims of ineffective assistance of counsel discussed in parts II, III, and IV, supra, Wisehart attacks as deficient certain aspects of counsel's performance during judicial sentencing.

First, Wisehart maintains that trial counsel failed to present mitigating circumstances during the sentencing hearing which would warrant a sentence less than death. As we stated in part IV, supra, counsel had already presented mitigating evidence during the guilt phase and discussed it during the penalty phase. Presenting this evidence again would have been cumulative. We find no deficient performance.

Second, Wisehart contends that trial counsel improperly conceded Wisehart's presence at the scene of the crime after vouching for his innocence during the penalty phase. During the sentencing hearing, counsel called the defense investigator as a witness. The witness testified that Wisehart admitted that he was present during the crime, but that he did not strike the victim. Wisehart alleges that this testimony is a concession by counsel that Wisehart was present during the crime. We find no deficient performance. Wisehart already confessed to the crime, thereby admitting his presence at the scene of the crime, and had been convicted of committing it. Counsel appears to have called the investigator to suggest

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(counsel was not ineffective for failing to present additional mitigating evidence because mitigating evidence adduced during guilt phase was incorporated into the sentencing phase and the jury was allowed to consider relevant mitigating evidence); Hayes v. Lockhart, 852 F.2d 339, 352 (8th Cir. 1988) (counsel's decision not to present additional mitigating evidence regarding defendant's drinking problem was a "reasonable trial tactic, one that was based upon counsel's calculated assessment that the risk of probable harm exceeded the possible benefit that might have resulted"), judgment vacated on other grounds, 491 U.S. 902 (1989); Celestine v. Blackburn, 750 F.2d 353, 357 (5th Cir. 1984) (no prejudice results where counsel omits during the penalty phase evidence adequately developed during the guilt phase and additional evidence which would not have changed the jury's conclusion).

why Wisehart deserved a sentence less than death.[27]

Third, Wisehart argues that counsel erred by arguing for an illegal sentence based on additional uncharged burglaries. Again, we find no deficient performance. Counsel reminded the court that when Wisehart confessed to the murder, he also admitted committing several other burglaries. As a possible way to avoid imposition of death and still provide a severe sanction, counsel suggested that Wisehart could be sentenced for those uncharged burglaries, resulting in a sentence of 50 years which could be imposed consecutively to 60 years for the murder charge. While such an approach would have faced obvious practical problems, the argument clearly constitutes zealous advocacy, not ineffective assistance of counsel.

VI

In addition to the claims of ineffective assistance of trial counsel presented in parts II, III, IV, and V, supra, Wisehart also argues that he was denied the effective assistance of appellate counsel to which he was entitled. Just as with claims of ineffective assistance of trial counsel, we analyze claims of ineffective assistance of appellate counsel according to the two-part test announced in Strickland, 466 U.S. at 668, 104 S.Ct. at 2052. See, e.g., Lowery, 640 N.E.2d at 1048 ("standard of review for a claim of ineffective assistance of appellate counsel is identical to the standard for trial counsel"), cert. denied, 116 S.Ct. 525 (1995). A petitioner claiming ineffective assistance of appellate counsel must show both deficient performance and resulting prejudice. Roche, 1997 WL 796189, at *3. The failure to establish either prong will cause the claim to fail. Id. And where the claim is that appellate counsel was ineffective for failing to claim on direct appeal the

[27] Counsel made several other arguments as to why Wisehart deserved a sentence less than death: (1) psychiatric testimony showed that Wisehart had serious mental problems (T.R. at 2443), and (2) Wisehart was in some respects like a child and it would not be proper to execute someone under these circumstances.

ineffective assistance of trial counsel, the petitioner must establish both deficient performance and resulting prejudice on the part of both trial counsel and appellate counsel. Id. Conversely, the failure to establish either prong with respect to either trial or appellate counsel will cause the entire claim to fail. Id.

A

Wisehart contends that he was denied the effective assistance of appellate counsel because of counsel's failure to raise alleged errors in numerous guilt and penalty phase jury instructions. Because we find no error in the giving of any of these instructions, we find that appellate counsel's perfonnance was not deficient in this regard.

A-1

Wisehart contends the guilt phase instructions erroneously permitted the jury to convict him of Felony Murder[28] and Burglary[29] on less than unanimous findings of

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[28] The jury instruction on Felony Murder read as follows:

To sustain the charge of murder, the State must prove the following:

First: That the defendant was committing or attempting to commit the crime of robbery or that the defendant was committing or attempting to commit the crime of burglary.

Second: That when the defendant did so, he engaged in conduct causing the death of [the victim], whether the killing was intentional, unintentional or accidental.

If you find from consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty. However, if you find in your consideration of all of the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty. (T.R. at 277.)

[29] The jury instruction on Burglary read as follows:

To sustain the charge of burglary, the State must prove the following:

First: That the defendant broke and entered the building or structure of [the victim]; and

Second: That when the defendant did do, he intended to commit the felony of Theft or the felony of Murder, and

guilt on the respective underlying crimes. The jury instruction on Murder charged the jury with determining whether Wisehart committed the murder while simultaneously committing or attempting to commit the crime of either Burglary or Robbery. Wisehart contends that based on the jury instruction, "it is reasonable to infer that some of the jurors could have convicted Wisehart of felony murder based on the burglary allegation while others convicted based on the robbery allegation."[30] Br. of Appellant at 109. However, the jury also found Wisehart guilty of separate counts of both Burglary and Robbery (and Theft). Thus, there was clearly a unanimous finding of guilt of Felony Murder with respect to the underlying offenses of both Burglary and Robbery. (The same analysis applies to the burglary count.)

A-2

Wisehart contends the guilt phase instructions erroneously failed to advise the jury of a possible "not guilty by reason of insanity" verdict on each count. Wisehart did not raise this issue in the trial court, on direct appeal, or in the post-conviction court. A claim not advanced until appellant's brief in an appeal from the denial of post-conviction relief is waived. Canaan, 683 N.E.2d at 235 (citing Howard v. State, 467 N.E.2d 1, 2 (Ind. 19[illegible])).

Third: That the structure was a dwelling.

If you find from your consideration of all the evidence that each of these propositions have been proved beyond a reasonable doubt, then you should find the defendant guilty.

However, if you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty. (T.R. at 281.)

[30] Wisehart contends that the jury should have been instructed that it could find Wisehart guilty of felony murder only after unanimously finding him guilty of both burglary and robbery, as alleged in the State's information. Br. of Appellant at 109.

Wisehart contends the guilt phase instructions constituted an improper judicial opinion about the weight to be accorded the testimony of certain expert witnesses.[31] First, Wisehart challenges the part of the instruction which stated that "the jury should not necessarily accept the ultimate conclusions of the experts as to the defendant's legal sanity or insanity." We have held before that "[a] jury is not obligated to believe expert testimony on the issue of insanity." Gambill v. State, 675 N.E.2d 668, 672 (Ind. 1996) (citing Bonham v. State, 644 N.E.2d 1223, 1227 (Ind. 1994)), reh'g denied. Second, Wisehart asserts that it was improper for the instruction to direct the jury that medical insanity is not the same as legal insanity and that not every mental disease or defect excuses the commission of a crime. At least at the time of Wisehart's direct appeal, there was controlling authority that these statements were a correct statement of the law. See Montano v. State, 468 N.E.2d 1042, 1045 (Ind. 1984); Taylor v. State, 440 N.E.2d 1109, 1111 (Ind. 1982) ("The existence of mental disease or deficiency does not ipso facto render a defendant legally insane."). Finally, Wisehart challenges the instruction which stated that lay testimony on the issue of insanity was proper and that it could be credited over expert testimony. At least at the time of Wisehart's direct appeal, there was controlling authority that this instruction was a

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[31] Wisehart challenges the following three instructions:

> 1.... You should consider the expert testimony in light of all other testimony presented concerning the development, adaptation and functioning of the defendant's mental and emotional processes and behavior controls and not necessarily accept the ultimate conclusions of the experts as to the defendant's legal sanity or insanity. You must decide the extent of the defendant's mental disability, if any, from a consideration of all of the evidence relating to such possible disability. (T.R. at 295.)
>
> 2. You are instructed that medical insanity is not the same as legal insanity as a bar to criminal prosecution. Not every mental aberration, defect or disease will excuse the commission of a crime. (T.R. at 296.)
>
> 3. Lay testimony on the issue of sanity is proper and may be credited over that of expert witnesses. (T.R. at 297.)

proper statement of the law. See Green v. State, 469 N.E.2d 1169, 1172 (Ind. 1984); Mayes v. State, 440 N.E.2d 678, 681 (Ind. 1982).

A-4

Wisehart contends the guilt phase instructions erroneously instructed the jury as to accomplice liability. Wisehart contends that these instructions were given without any credible evidence to support them. "An instruction is proper only if there is some evidence of probative value to support it." Dudley v. State, 480 N.E.2d 881, 903 (Ind. 1985), judgment vacated on other grounds by Dudley v. Duckworth, 854 F.2d 967 (7th Cir. 1988). During trial, Wisehart elicited testimony that it was a possibility that other people may have been involved in the crime.[32] We find such evidence to be sufficient as to support an instruction on aiding, inducing or causing an offense. And, of course, it is a major thrust of Wisehart's post-conviction claim that he had accomplices. See part I, supra.

A-5

Wisehart contends the penalty phase instructions erroneously created a substantial possibility that the jury based its recommendation on improper aggravators. The argument here is that because several penalty phase instructions made reference to "aggravating circumstances" (in the plural) where only one was alleged, there was a substantial risk that the jury based its death penalty recommendation upon multiple aggravating factors. While some instructions referred to aggravating circumstances in the plural, those instructions were recitations of general principles. The instruction charging the jury with what it should consider in making the death penalty recommendation referred to the aggravating circumstance in

[32] During the guilt phase of the trial, Captain Moberly testified that it was a possibility that Wisehart did not act alone in committing the crime. Detective Brown testified that he felt there was a possibility that other people were involved in the crime.

the singular.[33] See Baird v. State, 604 N.E.2d 1170, 1180-81 (Ind.1992), where we resolved the exact same issue in a similar manner.[34]

A-6

Wischart contends the penalty phase instructions erroneously permitted the jury to consider information not introduced at trial.[35] Wisehart's argument is that the

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[33] The relevant instruction referred to above stated the following:

> In making your recommendation concerning the death penalty, you should make the following determination:
>
> 1. That the defendant did, beyond a reasonable doubt kill the victim while committing or attempting to commit robbery and/or burglary, a determination that you have already made.
>
> 2. That, beyond a reasonable doubt, the defendant did so intentionally, and
>
> 3. That the mitigating circumstances that exist are out-weighed by the aggravating circumstance that is alleged.

... (T.R. at 330.) (emphasis added).

[34] In Baird v. State, where the aggravating circumstance was a multiple murder and the court repeatedly referred to the aggravating circumstances in the plural, we held that "[a]ny potential confusion that could have arisen in the mind of a reasonable juror as to how many aggravating circumstances existed and how to apply the evidence of each to the separate murders would certainly have been dispelled" by the instruction given which informed the jury that the State alleged only one aggravating circumstance. Baird v. State, 604 N.E.2d 1170, 1181 (Ind. 1992). Wisehart argues that the instruction in his case did not cure the problem because it was not as specific as the Baird instruction in that it did not specifically point out which aggravating circumstance was the only one that was alleged. We fail to find Wisehart's distinction significant.

[35] Wisehart challenges the following instruction:

> ...
>
> The Constitution of Indiana provides that in all criminal cases, you, the jury, shall have the right to determine the law and the facts. In determining the law, it is your sworn duty to determine it correctly, and as it in fact is, whatever may be the source of your information, or the basis of your conclusion. It is your duty to consider and weigh the instructions given and if you reject them, such rejection shall not be arbitrary and without what you regard as proper and sufficient reason.
>
> ...

(T.R. at 336.)

instruction's language advising the jury that it could determine the law from "whatever may be [its] source of information," the jury was allowed to consider any evidence or information irrespective of whether the judge admitted it into evidence. While perhaps susceptible of Wisehart's reading, we believe the challenged language was understood to mean that each juror could utilize his or her background, experience, beliefs and convictions in exercising his or her responsibility to determine the law under art. I, § 19, of the Indiana Constitution. See Bivins v. State, 642 N.E.2d 928, 946-47 n. 6 (Ind. 1994). In any event, we view this language as favorable to Wisehart and, in fact, have seen appellants in other capital cases challenge the trial court's refusal to employ it. See Fleenor v. State, 514 N.E.2d 80, 86 (Ind. 1987) (although a tendered instruction advising the jury to consider its background, experience, beliefs and convictions was rejected, another instruction was provided which conveyed the same basic message), cert. denied, 488 U.S. 872 (1988). But see Canaan v. State, 541 N.E.2d 894, 910-11 (Ind. 1989) (a tendered instruction advising the jury to consider its background, experience, beliefs and convictions was rejected).

A-7

Wisehart contends the penalty phase instructions erroneously misled the jury regarding the procedure for weighing the aggravating circumstances against the mitigating factors. First, he argues that because several instructions informed the jury that aggravating factors required proof beyond a reasonable doubt, the jury may have interpreted mitigating circumstances to require the same burden of proof. We have previously rejected this argument.[36] See Roche, 1997 WL 796189, at *10 (citing Miller v. State, 623 N.E.2d 403, 409 (Ind. 1993)); Bivins,

[36] Wisehart also claims that Ind. Code § 35-50-2-9(c) is unconstitutional for failing to explain the standard of proof required for mitigating circumstances. We have previously rejected this argument as well. Roche v. State, No. 45S00-9305-PD-588, 1997 WL 796189, at *10 (Ind. Dec. 31, 1997); Bivins v. State, 642 N.E.2d 928, 946 (Ind. 1994).

642 N.E.2d at 946. Second, he argues that he was denied due process and due course of law because the trial court failed to instruct the jury that the determination of the existence of mitigating factors does not require unanimity. We have previously rejected this claim. See Roche, 1997 WL 796189, at *12 (citing Harrison v. State, 644 N.E.2d 1243, 1259 (Ind. 1995)). See also Bivins, 642 N.E.2d at 947. Thirdly, he argues that the trial court failed to instruct the jury that it could give weight to mental and emotional evidence that did not rise to the level of an insanity finding. We have previously found the trial court's instruction that the jury "can consider as a mitigating circumstance '[a]ny other circumstance appropriate for consideration' " to be sufficient in this regard. See Bivins, 642 N.E.2d at 947.

A-8

Wisehart contends the penalty phase instructions erroneously instructed the jury on the range of possible penalties. At the time of his trial, Wisehart was serving a suspended ten year sentence for Arson. He argues that the trial court should have advised the jury regarding the possible execution of this sentence.[37] This claim is similar to a claim raised in another capital case, Johnson v. State, 584 N.E.2d 1092, 1101-02 (Ind. 1992). In Johnson, after the defendant was convicted of Felony Murder in the course of Burglary and Arson, the trial court advised the jury of the possible penalties for Murder. The defendant argued on appeal that it was error for the court not to have advised the jury of the possible penalty for Arson as well. We held that "it was not error to restrict this instruction to the more immediate potential consequences, i.e., those stemming from the verdict of guilty of murder." Id. at 1102. The argument in support of the exercise of the trial court's discretion is even stronger here where the arson conviction was unrelated

[37] This argument, contending as it does that the jury should have more information about sentencing alternatives to the death penalty, appears inconsistent with Wisehart's argument that the prosecutor committed misconduct by advising the jury of the maximum term of years for Murder.

to the crimes at issue.

A-9

Wisehart contends the penalty phase instructions erroneously advised the jury that its verdict was a recommendation that did not bind the court.[38] Wisehart couches his argument in the terms of Caldwell v. Mississippi, 472 U.S. 320, 328-29 (1985), where the Supreme Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." However, to establish a Caldwell-type violation, "a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." Romano v. Oklahoma, 512 U.S. 1, 9 (1994) (citing Dugger v. Adams, 489 U.S. 401, 407 (1989)); see also Lowery, 640 N.E.2d at 1044. This Court previously has held that it is not unconstitutional to instruct the jury that the ultimate sentencing responsibility rests with the trial judge, Lowery, 640 N.E.2d at 1044, because such an instruction accurately reflects the requirements of Indiana law. An Indiana jury does not impose a sentence, but instead makes a sentencing recommendation to the judge, who in turn decides what sentence to impose.

B

Wisehart contends that he was denied the effective assistance of appellate counsel because of counsel's failure to argue on direct appeal that the Indiana death penalty statute is unconstitutional on its face and as applied. In support of this theory, Wisehart now raises several constitutional challenges for our consideration. This Court previously has disposed of these issues adverse to his

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[38] The trial court instructed the jury as follows: "You may recommend whether the death penalty should be imposed, although the Court is not bound by your recommendation." (T.R. at 325.)

position. Because the law does not support these claims, counsel was not ineffective for failing to raise them on direct appeal.

B-1

Wisehart alleges that Indiana's death penalty statute is unconstitutional because it does not require an independent finding of probable cause prior to subjecting a defendant to capital procedures. We recently rejected this claim in Matheney v. State, 688 N.E.2d 883, 904 (Ind. 1997).

B-2

Wisehart challenges several aspects of the system of aggravating and mitigating factors contained in the death penalty statute.

First, he argues that the felony murder aggravator[39] is unconstitutionally vague and overbroad and fails to meaningfully narrow the class of murderers eligible for the death penalty. This claim was also disposed of adversely to Wisehart's position in Matheney. Id.

Second, he argues that the felony murder aggravator violates the double jeopardy clause and other provisions of the United States Constitution by allowing an individual to be convicted of felony murder and then allowing the State to use the predicate felony as the basis for the death penalty. We reject this argument. We are unaware of any--and Wisehart points us to no-- principle of double jeopardy jurisprudence that precludes the use of a felony conviction as an aggravating circumstance to support the imposition of a particular criminal sanction.

Third, he argues that Ind. Code § 35-50-2-9(b) is unconstitutional because it fails to provide that the sentencer may consider only charged aggravating circumstances in

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[39] Ind. Code § 35-50-2-9(b)(1).

support of a death penalty recommendation. We recently decided this issue adverse to Wisehart's position. Matheney, 688 N.E.2d at 905.

Fourth, he argues that Ind. Code § 35-50-2-9(c) is unconstitutional because it does not require the trier of fact to consider all proffered mitigating evidence. The permissive language of the preamble of this subsection ("[t]he mitigating circumstances that may be considered under this section") and of the "catch-all" mitigator ("[a]ny other circumstances appropriate for consideration")[40] does not render optional consideration by the jury of relevant proffered mitigating evidence. Matheney, 688 N.E.2d at 907.

Fifth, he argues that Ind. Code §§ 35-50-2-9(c)(2), (4), (5), and (6) are unconstitutionally vague and preclude the consideration of relevant mitigating evidence. The catch-all mitigator ("[a]ny other circumstances appropriate for consideration") properly allows the jury to consider all relevant mitigating evidence presented to it. See Bivins, 642 N.E.2d at 947.

Sixth, he argues that Ind. Code § 35-50-2-9(d) fails to limit the jury's consideration of guilt phase evidence to that which is relevant to charged aggravation and to mitigation, on the theory that this permits the jury to consider improper aggravating circumstances. This Court has rejected this claim. Woods v. State, 547 N.E.2d 772, 794 (Ind. 1989), on reh'g, 557 N.E.2d 1325 (Ind. 1990), cert. denied 501 U.S. 1259 (1991).

Seventh, we also reject Wisehart's unsupported claim that the statute permits the jury to consider the absence of mitigating evidence as an aggravating circumstance. See Matheney, 688 N.E.2d at 902; Bivins, 642 N.E.2d at 947

Eighth, Wisehart argues that Ind. Code § 35-50-2-9(c) unconstitutionally fails to require the jury be instructed on

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[40] Ind. Code § 35-50-2-9(c)(7).

the definition of both mitigation and "any other circumstances appropriate for consideration" and also on why the law requires consideration of mitigating circumstances. The terms "mitigation" and "any other circumstances appropriate for consideration" are not beyond the comprehension of the average lay juror, contrary to Wisehart's contention. See Matheney, 688 N.E.2d at 907. In any event, the trial court adequately instructed the jury as to the meaning of those terms.[41]

Ninth, he argues that the absence of prior criminal history mitigator is unconstitutionally vague. We recently rejected this claim. Wrinkles v. State, No. 82S00-9408-PD-741, 1998 WL 789, at *12-13 (Ind. Jan. 2, 1998). See also Proffitt v. Florida, 428 U.S. 242, 257 (1976), reh'g denied, 429 U.S. 875 (1976).

B-3

Wisehart also attacks several aspects of the balancing process in which the jury engages to reach its sentencing recommendation.

First, he argues that the jury recommendation provisions of Ind. Code § 35- 50-2-9[42] are unconstitutional because they fail to require the jury to find unanimously the existence of charged aggravating factors. We have previously held that the jury may recommend the death penalty only if it unanimously finds beyond a reasonable doubt the existence of at least one charged aggravator. Bivins, 642 N.E.2d at 947; Fleenor, 514 N.E.2d at 91 (citing Williams v. State, 430 N.E.2d 759, 765 (Ind. 1982)).

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[41] "Mitigation is defined as an abatement or diminution of a penalty or punishment imposed by law. Mitigating circumstances are circumstances which do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability." (T.R. at 334.)

[42] Ind. Code § 35-50-2-9(e) (1982); now Ind. Code § 35-50-2- 9(e) and (i) (Supp.1996).

Second, he argues that the jury recommendation provisions of Ind. Code §§ 35-50-2-9 are unconstitutional because they fail to require the State to prove beyond a reasonable doubt that the aggravators outweigh the mitigators. We rejected this argument in Bivins, stating that "[t]he determination of the weight to be accorded the aggravating and mitigating circumstances is not a 'fact' which must be proved beyond a reasonable doubt, but is a balancing process." Bivins, 642 N.E.2d at 946 (citing Daniels v. State, 453 N.E.2d 160, 171 (Ind. 1983), vacated on other grounds, 491 U.S. 902 (1989)); see Miller, 623 N.E.2d at 409.

Third, he contends that the jury recommendation provisions of Ind. Code § 35-50-2-9 are unconstitutional because they provide for a mandatory death penalty upon a finding of certain facts. This Court previously addressed and rejected this claim. Burris v. State, 642 N.E.2d 961, 968 (Ind. 1994), cert. denied 516 U.S. 922 (1995); Bivins, 642 N.E.2d at 946 (jury may consider mercy and is not bound to convict).

Fourth, he argues that the jury recommendation provisions of Ind. Code § 35- 50-2-9 unconstitutionally fail to require the sentencing jury to provide written findings or verdict forms and fail to require the sentencing court to make specific written findings. We previously have disposed of this argument contrary to Wisehart's position. Harrison, 644 N.E.2d at 1259 n. 28; Burris v. State, 465 N.E.2d 171, 190 (Ind. 1984), cert. denied, 469 U.S. 1132 (1985).

Fifth, he argues that Ind. Code § 35-50-2-9(h) (1982), the automatic review provision, is unconstitutional because it does not provide for meaningful appellate review of a capital defendant's conviction and sentence. Wisehart raised this issue, and this Court rejected it, in his direct appeal. See Wisehart, 484 N.E.2d at 958-59.

C

Wisehart argues that he was denied the effective assistance of appellate counsel when counsel failed to challenge on appeal the trial court's denial of trial counsel's motion to excuse two prospective jurors for cause during voir dire. Wisehart contends that the motions should have been granted because, in his view, the first of the two jurors was predisposed to sentence him to death and the second was unwilling to indulge him the presumption of innocence because of his invocation of the insanity defense. "The grant or denial of a challenge to a juror is within the discretion of the trial court," and the decision will be sustained unless "illogical or arbitrary." Shane v. State, 615 N.E.2d 425, 426 (Ind. 1993); Baird, 604 N.E.2d at 1186; Jackson v. State, 597 N.E.2d 950, 960 (Ind. 1992). We do not find the trial court's denial of the challenge for cause to be illogical or arbitrary.

During voir dire, prospective juror Wiand stated that she believed that in most circumstances, a person found guilty beyond a reasonable doubt of taking someone's life should be put to death.[43] This juror said that she could be fair and impartial as to the issue of defendant's guilt and that she would follow the court's instructions on various matters. Trial counsel (who also served as appellate counsel) moved to have this juror excused for cause but the motion was overruled.

Later during voir dire, prospective juror Boyland indicated that he felt it was "kind of contradictory" for a defendant to maintain both insanity and actual innocence; that if he were to assert an insanity defense, "my firsthand thoughts would be that I would be admitting to the crime ...

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[43] Wisehart relies on Morgan v. Illinois, 504 U.S. 719 (1992), to support his proposition that he was denied due process as a result of Wiand remaining on the jury. Morgan held that if a juror who will automatically vote for the death penalty in every case is empaneled on the jury and the death sentence is imposed, the State is not entitled to execute the sentence. Morgan, 504 U.S. at 729. The reasoning of the court was that such a juror would be unable in good faith to consider evidence of aggravating and mitigating circumstances. Id.

any crime. That's just my firsthand thoughts."[44] (S.T.R. at 576; 577.) This juror also said that he would think of the defendant as innocent until he heard all the evidence and that he would be particularly cautious in deciding guilt or innocence knowing that the death penalty was an issue in the case. Trial counsel (who also served as appellate counsel) moved to have this juror excused for cause but the motion was overruled.

We do not think appellate counsel's performance in failing to challenge the trial court's rulings on appeal was deficient. The first juror did not say that she would automatically vote for the death penalty and did say that she would follow the court's instructions. The second juror did not say that he would not employ the presumption of innocence and did say that he would be particularly cautious in deciding guilt because the death penalty was being sought. When the challenges for cause were rejected, trial counsel did not use peremptory challenges to strike either of these jurors despite having such challenges available.[45] Wisehart does not contend that the failure so to challenge constituted ineffective assistance of counsel. As trial counsel, appellate counsel was in as good a position as anyone to make a judgment as to whether their presence on the jury denied his client a fair trial. And courts on appeal have regularly found no trial court error under similar circumstances. See Shane, 615 N.E.2d at 427; Jackson, 597 N.E.2d at 961; Smith v. State, 432 N.E.2d 1363, 1368 (Ind. 1982).

D

Wisehart makes a brief set of additional arguments that his appellate counsel on direct appeal was ineffective. As we noted supra, a petitioner arguing ineffective assistance of appellate counsel must demonstrate both deficient

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[44] This testimony was also discussed in part II-B-2, supra.

[45] See Shane v. State, 615 N.E.2d 425, 427 (Ind. 1993) (court found no trial court error in denying challenge for cause but noted that "if [defendant] had been forced to accept a juror because of the lack of peremptory challenges left, an issue might have been presented").

performance and prejudice. Lowery, 640 N.E.2d at 1048, cert. denied, 516 U.S. 992 (1995). While Wisehart makes brief claims of "deficient representation on appeal," he makes no claim or showing of prejudice with respect to any of them.[46] See Br. of Appellant at 122- 25.

VII

Wisehart contends he is entitled to post-conviction relief because the political nature of the appointments of public defenders in Madison County and counsel's alleged attendant lack of independence from the trial judge justify a presumption of ineffectiveness at trial. He contends that the "Madison County Public Defender system did not provide the independent representation recommended by the American Bar Association standards, thereby saddling [defendant] with counsel who labored under conflicting duties." Br. of Appellant at 126-27. As did the petitioner in our recent opinion, Roche, 1997 WL 796189, at *19-20, Wisehart's claim is grounded in the dicta of Cronic, 466 U.S. at 659 n. 26, that suggests that there will be certain circumstances where the court will presume the ineffective assistance of counsel without requiring the petitioner to meet his or her burden under Strickland. Here (as in Roche), the surrounding circumstances, including the actual performance of counsel at trial and on direct appeal, rebut any claim of a general presumption.

VIII

Wisehart alleges that he is entitled to post-conviction relief because of misconduct on the part of the prosecutor at trial. As a preliminary matter, we note that post-conviction relief may not be sought with respect to issues that were

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[46] Wisehart contends in this regard that appellate counsel was ineffective in his direct appeal because counsel failed to argue the false confession issue; made only skeletal arguments as to jury selection issues without including the transcript; failed to explain why a sociologist was needed; failed to establish abuse of discretion in exclusion of Bradshaw and Joy testimony; and failed to support several arguments with authority.

available on direct appeal. Here Wisehart in the main asserts no basis for raising these prosecutorial misconduct claims for the first time on collateral review--he does not argue newly discovered evidence or ineffective assistance of counsel or even the ubiquitous fundamental error doctrine. But while the State argued that these claims were waived at the post-conviction court level, it elects to address them on the merits here and so we will as well.

When reviewing a claim of prosecutorial misconduct, we must determine: "(1) whether there was misconduct by the prosecutor; and (2) whether that misconduct, under the circumstances, placed the defendant in a position of 'grave peril' to which the defendant should not have been subjected." Kent v. State, 675 N.E.2d 332, 335 (Ind. 1996) (citing Smith v. State, 516 N.E.2d 1055, 1063 (Ind. 1987)); Schlomer v. State, 580 N.E.2d 950, 956 (Ind. 1991). "The gravity of peril turns on the probable persuasive effect of the misconduct on the jury's decision, not on the degree of impropriety of the conduct." Kent, 675 N.E.2d at 335 (citing Bradley v. State, 649 N.E.2d 100, 107-8 (Ind. 1995)); Marshall v. State, 621 N.E.2d 308, 320 (Ind. 1993).

A

As noted supra, Gregory Scott Johnson was a key prosecution witness. Wisehart contends that impermissible prosecutorial misconduct occurred when the prosecutor failed to respond completely and accurately to a motion to reveal agreements between the State and Johnson.[47] "The prosecution must disclose all agreements made with a witness which may influence a witness'[s] testimony." McCord v. State, 622 N.E.2d 504, 509 (Ind. 1993). See also McBroom v. State, 530 N.E.2d 725, 729 (Ind. 1988). But the duty to disclose arises only when a confirmed promise exists. Id.

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[47] This issue was decided on direct appeal against Wisehart, but because some of the evidence presented to the post conviction court appears to not have been available on direct appeal, we revisit it. Wisehart v. State, 484 N.E.2d 949, 956 (Ind. 1985), cert. denied 476 U.S. 1189 (1986).

Wisehart contends that an agreement existed between Johnson and the State whereby the State would dismiss pending charges against Johnson in return for his testimony against Wisehart. We find the evidence on this contention supports conflicting inferences and so affirm the post-conviction court's determination that there were no such agreements.[48] It is clear from the record that Johnson was a usual suspect in Anderson area burglaries, often rounded up after such crimes had been committed. At the post-conviction hearing, Detective Tracy testified that Johnson had been a major participant in a church burglary which occurred shortly before the murder of which Wisehart was convicted. Charges were never filed against Johnson. Tracy testified that another officer, Detective Hay, who was in charge of the investigation, recommended that Johnson not be prosecuted after Johnson cooperated with police in the Wisehart case. However, Tracy testified that the recommendation not to prosecute may have been made because Johnson was charged with other burglaries. Tracy testified that he knew of no connection between the Wisehart murder case and the decision not to prosecute Johnson for the church burglary and Wisehart presented no testimony from Hay on this issue.

On the eve of Wisehart's trial, Johnson was arrested for public intoxication and theft by two officers, Reed and Wasilewski. Both Officer Reed and Officer Moberly testified at the post-conviction hearing that Moberly had called Reed and asked Reed to drop these charges against Johnson because Johnson was a witness in the Wisehart case. In a written report filed some months later in still another burglary case in which Johnson was a suspect, Wasilewski wrote that the public intoxication and theft charges had been dropped because Johnson "was helping on a murder." (R. at 2724; 2730.) For his part, Moberly testified that he had requested that the charges be dropped because he "felt like with Mr. Johnson being scheduled to testify and he was

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[48] We acknowledge that the post-conviction court's findings on this issue are conclusory.

going to be a major witness, I felt like we didn't want to discourage him from testifying or cause or give him reason not to." (R. at 1269-70.) Moberly also testified that he thought Johnson had reasonable defenses to the theft charge and that there had been no agreement between the State and Johnson to testify in return for dropping the charges.

Because the evidence does not point clearly and unequivocally in the direction of the existence of an agreement between the State and Johnson, we affirm the post-conviction court's conclusion that the State did not violate its disclosure obligations.[49] See St. John v. State, 523 N.E.2d 1353, 1356 (Ind. 1988) (citing Burgin v. State, 475 N.E.2d 1155, 1156-57 (Ind. 1985)) ("... without concrete evidence of an understanding we have not required disclosure"). See also McCord, 622 N.E.2d at 509 ("When a witness hopes for leniency in exchange for favorable testimony and the State neither confirms nor denies that hope, then an express agreement does not exist.").[50]

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[49] Because we find the prosecutor did not violate any disclosure obligations, it is unnecessary to examine whether the prosecutor's conduct placed Wisehart in a position of grave peril.

[50] The evidence indicates that the police department did not file and dropped charges to secure the testimony of Johnson. We believe that whether or not there was a formal agreement, certainly Johnson was aware of the benefits he was receiving for providing what the police thought to be valuable testimony. We recognize that in Kyles v. Whitley, 514 U.S. 419, 437-38 (1995), the Supreme Court stated that the prosecutor "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police[ ] [and] whether the prosecutor succeeds or fails in meeting this obligation (whether that is, a failure to disclose in good faith or bad faith, see Brady [v. Maryland], 373 U.S. [83], [ ] 87 [(1963)], 83 S.Ct. [1194], [ ] 1196-97), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." Id. All that being said, we still find no prosecutorial misconduct because (1) there is no concrete evidence of an agreement between the State and Johnson and (2) the record reflects that Wisehart's counsel cross-examined both Johnson and Detective Hay on the question of Johnson's cooperation with the police, indicating that Johnson had been involved in a number of burglaries for which he was never charged. We believe that the cross-examination of these witnesses regarding this

B

Wisehart raises multiple additional claims of improper behavior by the prosecutor, none of which rise to the level of prosecutorial misconduct such that Wisehart is entitled to post-conviction relief. First, Wisehart claims that the prosecution improperly misrepresented that it would have a key witness, Tony Fuqua, present for trial. While the State did indicate before trial that it would subpoena Fuqua and might or might not use him as a witness at trial, the trial court also informed defense counsel that Wisehart could subpoena Fuqua as well. The failure of the State to have Fuqua available did not preclude Wisehart from calling Fuqua as a witness. See Jenkins v. State, 627 N.E.2d 789, 793 (Ind. 1993) (defendant had burden of calling witnesses who may have aided in the defense).

Second, Wisehart claims that the prosecution improperly refused to turn over the victim's autopsy report until one week before trial. As discussed supra, the post-conviction court found no discovery violations by the State. Our review of the record indicates that the prosecution advised Wisehart that the autopsy report was available in the police property room approximately three weeks before trial.

Third, Wisehart claims that the prosecution made improper arguments during the guilt phase. Wisehart claims that the prosecutor repeatedly referred to Wisehart as "scary." Our review of the record reveals that the prosecutor referred to Wisehart's alleged actions as scary, but did not call Wisehart "scary."[51] Next, Wisehart alleges that it was

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matter indicates a general awareness by Wisehart's counsel of the conduct of the police in securing Johnson's testimony. See footnote 67, infra, and accompanying text.

[51] The following are statements made by the prosecutor during closing argument which Wisehart challenges:

> Talking about the testimony of Toby Lamber ... folks, to me that was scary, and I've been around a little bit, but to me for people to be putting crimes in a hat, then on a piece of paper and drawing them out and that's the one you're supposed to commit ... that's scary. That is scary. (T.R. at 2233-34.) I find it a little

improper for the prosecutor to request the jury to convict Wisehart so he doesn't commit rape.[52] Wisehart contends that this statement was an improper attempt by the prosecutor to frighten the jurors into a conviction. "It is misconduct for a prosecutor to request the jury to convict a defendant for any reason other than his guilt." Maldonado v. State, 265 Ind. 492, 500, 355 N.E.2d 843, 849 (1976). See also Caldwell v. State, 508 N.E.2d 27, 28 (Ind. 1987); Johnson v. State, 453 N.E.2d 365, 369 (Ind. Ct. App. 1983). It is also misconduct "to phrase final argument in a manner calculated to inflame the passions or prejudice of the jury." Limp v. State, 431 N.E.2d 784, 788 (Ind. 1982) (citations omitted). We agree that this argument by the prosecutor implicates these principles. However, here, where Wisehart's letter to Johnson, admitted into evidence, referred to rape, it was not beyond the bounds of permissible advocacy for the prosecutor to allude to it in closing argument. See English v. State, 575 N.E.2d 14, 16 (Ind. 1991) (where the prosecutor characterized defendant as "experienced" due to his prior conviction, court held that "[t]he prosecutor's comment did not inject anything that was not already in evidence").

Fourth, Wisehart claims that the prosecution improperly misled the jury about the number of aggravating

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bit scary and a little bit different for a person to brag about how they rolled people, how they've done what they've done to people. I find it a little bit scary for people to brag about how they've busted guards and how they've done this and how they've done that. I find it a little bit scary when he talks to Scott Johnson in the form of these letters and says he wants a gun when he gets out. (T.R. at 2235.)

[52] During closing argument, the prosecutor referred to the contents of a letter written by Wisehart to Johnson:

> "You know, we've have a good time. We're going to have some more good times." He said, "you know, we've committed about every crime there is except rape and murder." [sic] Ladies and gentlemen of the jury in my opinion, the State had done its job in this case. He's committed murder now. Don't let him commit rape. (T.R. at 2300.)

circumstances.[53] While Wisehart was only charged with one aggravating circumstance—intentional murder during the course of a burglary and robbery[54]—the prosecutor told the jury during closing argument that there were two aggravating circumstances: an intentional murder in the course of burglary and an intentional murder in the course of robbery. In substance, of course, these were two separate aggravating circumstances. In this context, it was not improper for the prosecution to so argue.[55]

Fifth, Wisehart claims the prosecution improperly misled the jury regarding its duty to consider Ind. Code § 35-50-2-9(c)(6), the statutory mitigating circumstance of mental defect.[56] During closing argument, the prosecutor discussed each of the statutory mitigating circumstances. When the prosecutor reached the mitigating circumstance of mental defect, he argued that the jury's guilty verdict meant that the jury had rejected Wisehart's contention that he had acted as a result of mental disease or defect. We find nothing improper about this argument.

Sixth, Wisehart claims the prosecution improperly

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[53] Ind. Code § 35-50-2-9(a): The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged.

[54] Ind. Code § 35-50-2-9(b)(1): The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnaping, rape, or robbery.

[55] Wisehart also claims in this instance that it was ineffective assistance of counsel to not object to the prosecutor's improper statements. Because we do not find these statements to be improper, we do not find counsel's failure to object to be ineffective.

[56] Ind. Code § 35-50-2-9(c)(6) provides that the following is a mitigating circumstance: "The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or of intoxication."

advised the jury during the penalty phase that if Wisehart was not sentenced to death, "he would spend only 30 years in prison." At the time of the murder Wisehart was accused of committing, the maximum term of years for which a person convicted of murder could be sentenced was 60 years; with good time credit, such an individual could be released in 30 years. Furthermore, in a capital case, a jury may be advised as to alternative sentencing possibilities. Fleenor v. State, 622 N.E.2d 140, 145 (Ind. 1993), cert. denied, 513 U.S. 999 (1994). The trial court accurately instructed the jury on the penalty for Murder.[57] We presume the jury followed the instruction.

Seventh, Wisehart contends the prosecution improperly argued during the penalty phase that Wisehart acted alone after tendering during the guilt phase an accomplice liability instruction. During the guilt phase, there was some evidence that Wisehart was not the sole participant in the crime.[58] As such, an accomplice liability instruction was appropriately requested. During the penalty phase, the State discussed Ind. Code § 35-50-2-9(c)(4), the statutory mitigating circumstance of relatively minor participation.[59] The prosecutor's argument against the existence of this mitigator was that there was "absolutely no evidence that others participated in the crime." While this penalty phase argument may well have been inconsistent with tendering a guilt phase instruction on accomplice liability, we find any

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[57] The instruction read as follows:

> A person who commits murder shall be imprisoned for a fixed term of 40 years, with not more than 20 years added for aggravating circumstances or not more than 10 years subtracted for mitigating circumstances ...

[58] During the guilt phase of the trial, Captain Moberly testified that it was a possibility that Wisehart did not act alone in committing the crime. Detective Brown testified that he felt there was a possibility that other people were involved in the crime. Cf. footnote 32, supra, and accompanying text.

[59] Ind. Code § 35-50-2-9(c)(4) provides that it is a mitigating circumstance where "the defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor."

impact harmless. The argument was made as a specific comment on the availability of the "minor participation" mitigator. Neither at the penalty phase nor in post-conviction did Wisehart contend this mitigator was available. And, of course, Wisehart predicates much of his claim for post-conviction relief on the "newly-discovered evidence" that he was an accomplice. See part I, supra.

Eighth, Wisehart contends that impermissible prosecutorial misconduct occurred when the prosecutor improperly emphasized future dangerousness and failure to reform as reasons for imposing the death penalty when these are not valid aggravating circumstances under Indiana law because they were not included in the death penalty statute. See Ind. Code § 35-38- 1-7 (1983). It was inappropriate for the prosecutor to advance these arguments as reasons for imposing death: a death sentence is imposed for what the defendant has done, not what he or she might do. However, we believe jurors recognize that our adversarial system of litigation will inevitably experience some overly zealous advocacy from time to time. Here, the jury was instructed, pursuant to a death sentence statute, as to what aggravating factors could be found in order to recommend a death sentence. We presume that the jury followed such instruction and find no prosecutorial misconduct.

IX

Wisehart contends that the sentencing order was unreliable because it was based on the materially incorrect finding that there were no mitigating factors.[60] "A trial court is under no duty to deem mitigating every factor so alleged by the defendant simply because it is supported by some evidence in the record." Bivins, 642 N.E.2d at 952. Our review of the record indicates that the trial court did consider all the mitigation evidence presented by Wisehart, but found

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[60] Wisehart asserts no basis for raising this claim for the first time on collateral review but we address it on the merits because the State on appeal does so. See generally part VIII, supra.

none of the circumstances to be mitigating.[61] Furthermore, the trial court explained in its order why it did not find the evidence to rise to the level of mitigating circumstances within the meaning of the death penalty statute.

X

Wisehart alleges that he is entitled to post-conviction relief because of certain errors committed before and during trial.

A

Wisehart claims that he is entitled to post-conviction relief because the State impermissibly used Gregory Scott Johnson as its agent to acquire information against Wisehart, in contravention of Massiah v. United States, 377 U.S. 201

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[61] The trial court made the following findings to conclude that there were no mitigating circumstances:

> (1) Evidence showed that defendant had a significant history of prior criminal conduct.
>
> (2) There was some evidence that defendant had some emotional problems from time to time but there was no evidence that defendant was under the influence of extreme mental or emotional disturbance when he committed the murder.
>
> (3) There was no evidence that the victim participated in or consented to the defendant's conduct.
>
> (4) While there was reference to the possibility that others may have been involved in the crime, there was no proof of such involvement. Furthermore, the defendant's participation was not minor.
>
> (5) There was no evidence that defendant acted under the substantial domination of another person.
>
> (6) The defendant had the capacity to appreciate the criminality of his conduct, to conform his conduct to the requirements of the law, and was not suffering from a mental disease or defect.
>
> (7) The defendant is a young man, but regardless of his youth, defendant led a life of crime and has been placed or incarcerated in several institutions.

(T.R. at 2451-55.)

(1964).[62] In Massiah, the United States Supreme Court held that a defendant's right to counsel is violated when the government intentionally creates a situation likely to induce an incriminating statement from a charged defendant in the absence of counsel.[63] Massiah, 377 U.S. at 206. Wisehart contends that Johnson's trial testimony that Wisehart told Johnson to "try to make it look like I'm crazy" falls into this category.[64]

In addressing a claim that a defendant was denied Sixth Amendment right to counsel in violation of Massiah, we undertake the analysis set forth in Kuhlmann v. Wilson, 477 U.S. 436 (1986). There the Supreme Court stated that "the Sixth Amendment is not violated whenever--by luck or happenstance--the State obtains incriminating statements from the accused after the right to counsel has attached." Id. at 459 (quoting Maine v. Moulton, 474 U.S. 159, 176 (1985)). A defendant does not make out a Sixth Amendment violation "simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." Kuhlmann, 477 U.S. at 459. The evidence in this case does not sufficiently indicate that the State took some deliberate action to elicit incriminating statements from Wisehart.

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[62] Wisehart asserts no basis for raising this claim for the first time on collateral review but we address it on the merits because the State on appeal does so. See generally part VIII, supra.

[63] In Massiah v. United States, 377 U.S. 201 (1964), the defendant, along with a codefendant, was charged with possession of narcotics aboard a U.S. vessel. The defendant retained an attorney and was released on bail. Subsequently, the codefendant agreed to cooperate with the State in its continued investigation of defendant. Pursuant to this agreement, the State was able to listen to conversations between the defendant and codefendant during the course of which defendant made several incriminating statements. The statements were eventually admitted into evidence over defendant's objection.

[64] We consider this statement to be incriminating because it suggested that Wisehart's insanity defense was fabricated.

Our review of the record suggests that the only evidence indicating that the State engaged in improper conduct was the post-conviction testimony of Johnson and this evidence contradicted Johnson's trial testimony.[65] At trial, Johnson was a star witness for the State. While his principal value was in introducing highly damaging letters Wisehart had written him when the two were in prison,[66] he also testified that he had visited Wisehart in jail and Wisehart, aware that Johnson would be a witness, had told him, "Try to make it look like I'm crazy." (T.R. at 1118.) Johnson also testified that prior to Wisehart's arrest, he had asked Wisehart whether he had been killing old ladies. Johnson testified that Wisehart demonstrated certain body language (dropping his head and shaking it) which suggested to Johnson "that something was wrong." Despite vigorous cross-examination attempting to paint Johnson as acting out of self-interest, Johnson gave no indication that he was acting on the State's behalf.[67]

During the post-conviction hearing, Johnson testified that he was encouraged by the State to go visit Wisehart at the jailhouse in order to solicit information about the crime and that he visited Wisehart on more than one occasion. Johnson also contradicted the testimony he had given at trial as to the "[t]ry to make it look like I'm crazy" and "killing old ladies" statements.

Subsequent to Wisehart's trial, Johnson himself was convicted of capital murder in an unrelated case and sentenced to death. The same prosecutor responsible for

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[65] During trial, defense counsel alluded to the fact that former inmates were ordinarily not allowed to be visitors, but Johnson never explained how he was able to visit Wisehart nor did Johnson suggest that the State encouraged such visitations.

[66] No issue relating to the admissibility of these letters is raised in this appeal.

[67] Wisehart's counsel attacked Johnson's credibility by questioning Johnson about (1) Johnson being a snitch for the police and (2) being investigated for numerous burglaries just before providing the police with a statement about Wisehart and letters written by Wisehart to Johnson.

Johnson's conviction questioned Johnson at Wisehart's post-conviction hearing and Johnson was openly hostile. There is no evidence other than Johnson's post-conviction statements to suggest that the State took any deliberate actions to elicit testimony from Wisehart. Defense counsel's cross-examination of Johnson at trial reflects that on several occasions Johnson provided the police with helpful information regarding other crimes in order to engage in plea negotiations for his own benefit.[68] The evidence in this case gives rise to an inference that Johnson obtained the allegedly incriminating statements on his own independent from any alleged police persuasion and then changed his story at the post-conviction hearing to retaliate against the prosecutor.[69]

Even if we accept at face value Johnson's testimony that the State encouraged him to solicit information from Wisehart, this testimony did not constitute a sufficient showing that the right to counsel was violated. In Kuhlmann, where the court found that a police officer instructed an informant to listen to the defendant for information regarding the identities of other participants, the court held that because the informant never asked the defendant any questions concerning the pending charges and only listened to the defendant's "spontaneous" and "unsolicited statements," there was no violation of the right

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[68] See Dodson v. State, 502 N.E.2d 1333, 1336 (Ind. 1987) (where a fellow inmate who was a trustee testified about incriminating statements made by defendant, court found no Sixth Amendment violation because the fellow inmate collected the incriminating statements on his own initiative and independent of the police). See also United States v. Darden, 70 F.3d 1507, 1541 (8th Cir. 1995), cert. denied 116 S.Ct. 1449 (1996) (where a witness agreed to cooperate with the government after the defendant made the incriminating statements, the court held that the witness was a private citizen, not a state actor, when the statements were made and thus the defendant's constitutional rights were not implicated by the government's subsequent use of the witness's testimony).

[69] We are mindful of the fact that "proof that the State 'must have known' that its agent was likely to obtain incriminating statements from the accused in the absence of counsel suffices to establish a Sixth Amendment violation." Maine v. Moulton, 474 U.S. 159, 176 n. 12 (1985). However, Wisehart has provided us with no evidence with which to undertake such an analysis.

to counsel. Kuhlmann, 477 U.S. at 460. The Kuhlmann test has not been met because there was no evidence as to any specific questions Johnson asked Wisehart in order to obtain the alleged incriminating statements.

We find no evidence to support the claim either that the State improperly used Johnson as its agent or that it deliberately tried to obtain incriminating statements from Wisehart in violation of Massiah. And even if we assumed that the State did improperly elicit information from Wisehart by using Johnson as its agent, the "conduct does not automatically require reversal." See Parker v. State, 533 N.E.2d 134, 135 (Ind. 1989). While the "try to make it look like I'm crazy" statement must be assumed to have had an adverse effect on Wisehart's insanity defense, it was a very minor part of Johnson's testimony. Johnson's real value to the State was in his testimony concerning the voluminous highly damaging correspondence which Wisehart sent to Johnson while they were in prison. The rest of his testimony was a sideshow.

B

Wisehart alleges that he is entitled to post-conviction relief because the State's charging instrument for Felony Murder was defective.[70] Wisehart alleges he was denied notice, due process, and due course of law because the State did not allege completely the Felony Murder count and thereby narrow the class of individuals eligible for the death penalty. The purpose of an information is to provide a defendant with notice of the crime for which he is charged so that he is able to prepare a defense. Myers v. State, 510 N.E.2d 1360, 1366 (Ind. 1987). In support of his argument, Wisehart contends that Count I, Murder, was deficient for failing to allege (1) that Wisehart broke into the victim's apartment and (2) that Wisehart intended to commit a

[70] Wisehart asserts no basis for raising this claim for the first time on collateral review but we address it on the merits because the State on appeal does so. See generally part VIII, supra.

specific felony therein. While the Murder count did not specifically allege that Wisehart broke in the victim's apartment with the intent to commit a specific felony, it did charge that Wisehart killed the victim while committing Burglary. (T.R. at 9.) Count III, Burglary, set forth the specific elements that Wisehart contends were missing in Count I. Because the information read as whole sufficiently notified Wisehart of the crimes charged, we do not find that Wisehart was denied notice, due process, or due course of law.

C

Wisehart contends that he is entitled to post-conviction relief because evidence suggests that the jury impermissibly considered polygraph evidence.[71] To obtain relief on a claim of juror exposure to extrinsic evidence, an appellant must meet the three-part test in Fox v. State, 457 N.E.2d 1088, 1093 (Ind. 1984), by showing by a preponderance of the evidence that: (1) the exposure to extrinsic material occurred; (2) the exposure is supported by the evidence; and (3) there is a likelihood that the verdict was affected. We find that Wisehart failed to meet this test.

During the post-conviction hearing, Wisehart introduced the January 31, 1994, affidavit of a juror in the 1983 Wisehart trial, the entire substance of which is as follows:

> During Mark Wischart's trial, I learned that Mark Wisehart had taken a polygraph test. The jury had been brought to the courthouse, and was preparing to begin court when we were told court would not be held that day. I learned the court session had been canceled because Mark Wisehart was to take a

[71] Although Wisehart asserts no basis for raising this claim on collateral review, we address it as one reasonably understood to assert a claim for a new trial based on newly discovered evidence. See part I, supra, for the test used in analyzing claims of newly discovered evidence. We note that to succeed under this test, Wisehart must make a showing that due diligence was used to discover the evidence.

> polygraph test. I do not recall who gave me the information about the polygraph. After the polygraph, the trial continued, and I never learned the results of Mark Wisehart's polygraph test.

(R. at 2217.)[72] Wisehart does not point us to any live testimony or other evidence of any kind on this contention.

We conclude that this averment, standing as it does alone, does not entitle Wisehart to post-conviction relief. Our holding in Fox emphasized that we may determine the effect of the extrinsic evidence only after it is proven by a preponderance of the evidence that the jury saw or heard the material complained of. Fox, 457 N.E.2d at 1093. The affidavit gives no indication that any other juror was aware of this information. See Butler v. State, 622 N.E.2d 1035, 1040-41 (Ind. Ct. App. 1993) (juror learned that someone fired a gun at a prosecution witness on the morning she was supposed to testify, and the court concluded that while there was evidence to support the juror's knowledge, the defendant failed to demonstrate a substantial possibility that the jury was improperly influenced). Wisehart does not contend that any other juror provided the post-conviction court with any information concerning a polygraph test. Additionally, the affidavit presented by Wisehart gives no indication that this information affected this juror's attitude toward the case in any way. Without a showing that any of these facts had an impact on the jury verdict or were used improperly in arriving at a verdict, no claim for relief is established.

D

Wisehart contends that he is entitled to post-conviction relief because the prosecutor called the jury's attention to

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[72] We acknowledge that generally references to polygraph exams are inadmissible absent a stipulation by both parties. See Willoughby v. State, 660 N.E.2d 570, 576 (Ind. 1996) (citations omitted); Conn v. State, 535 N.E.2d 1176, 1180 (Ind. 1989).

Wisehart's refusal to supply a voice exemplar.[73] Wisehart argues that this was an impermissible comment on post-arrest, post-Miranda silence in violation of Doyle v. Ohio. During trial, the State may not comment upon a defendant's post-arrest, post-Miranda warning silence because that silence may be nothing more than an exercise of the Fifth Amendment right. See Doyle v. Ohio, 426 U.S. 610, 617 (1976). Here the voice exemplar which Wisehart refused to give had been sought for the sole purpose of comparing Wisehart's voice with that recorded in an anonymous phone call to the police.[74] It was not sought for testimonial[75] or self-incriminating purposes. In any event, compelled production of voice exemplars does not violate the Fifth Amendment. United States v. Prewitt, 553 F.2d 1082, 1086 (7th Cir. 1977), cert. denied 434 U.S. 840 (1977) (citing United States v. Dionisio, 410 U.S. 1, 15 (1973), and Gilbert v. California, 388 U.S. 263, 266-67 (1967)). As such, commenting upon them did not violate Doyle.

E

Wisehart alleges that he is entitled to post-conviction relief because the state's offer to dismiss the death penalty should have been considered as a mitigating circumstance.[76] While Wisehart contends that the State had offered to dismiss the death penalty request for a straight-up guilty

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[73] Wisehart asserts no basis for raising this claim for the first time on collateral review but we address it on the merits because the State on appeal does so. See generally part VIII, supra.

[74] During discovery, the State requested Wisehart to provide a voice exemplar so that a comparison could be made with an anonymous phone call made to the police reporting the murder. Apparently, Wisehart did provide a voice exemplar, but because the sample was of poor quality, the State requested that Wisehart provide another voice exemplar. Wisehart refused and was held in contempt of court for this refusal.

[75] See Pennsylvania v. Muniz, 496 U.S. 582, 589 (1990) (quoting Doe v. United States, 487 U.S. 201, 210 (1988)) ("In order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information.").

[76] Wisehart asserts no basis for raising this claim for the first time on collateral review but we address it on the merits because the State on appeal does so. See generally part VIII, supra.

plea, the record suggests that substantial additional conditions were placed on the offer. In any event, we fail to see how evidence that the State offered to drop the death penalty charge in exchange for a guilty plea is a mitigating circumstance. Mitigating circumstances are "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978). See also Huffman v. State, 543 N.E.2d 360, 377 (Ind. 1989), overruled on other grounds by Street v. State, 567 N.E.2d 102, 105 (Ind. 1991). Furthermore, provisions such as Evid.R. 408 (prohibiting the admission of offers to compromise to prove the invalidity of a claim) and Ind. Code § 35-35-3-4 (prohibiting the admission of plea agreements not approved by a court) show a strong policy promoting compromise and settlement which would be undercut by the approach Wisehart advocates.

Conclusion

We affirm the post-conviction court's denial of Mark Allen Wisehart's petition for post-conviction relief.

SHEPARD, C.J., and DICKSON and SELBY, JJ., concur.

BOEHM, J., concurs except for part I-B-3; he nevertheless concurs in the result of part I for the reasons set forth in part I-B-1 and part I-B-2.

ATTORNEY FOR APPELLANT

Gary W. Miracle
1106 Meridian Plaza, Suite 559
Anderson, Indiana 46106

ATTORNEY FOR APPELLEE

Linley E. Pearson
Attorney General of Indiana

Joseph N. Stevenson
Deputy Attorney General

219 State House
Indianapolis, Indiana 46204

IN THE

SUPREME COURT OF INDIANA

[filestamp]
FILED
OCT 31 1985
s/Marjorie N. O'Laughlin
CLERK OF THE
INDIANA SUPREME AND
COURT OF APPEALS

MARK ALLEN WISEHART,)
)
Appellant,)
)
v.)
)
STATE OF INDIANA,)
)
Appellee)

No. 384 S 89

APPEAL FROM THE MADISON SUPERIOR COURT DIVISION III
The Honorable Thomas Newman, Jr., Judge

PIVARNIK, J.

Defendant-Appellant Mark Allen Wisehart was found guilty by a jury in the Madison Superior Court, Division III, of the crimes of murder, burglary, robbery and theft. The prosecuting attorney requested consideration of the death penalty on the murder charge. After finding Defendant guilty, the jury reconvened and returned a recommendation

of death. On September 26, 1983, the trial court sentenced the defendant to death on the murder charge, said sentence to be carried out thirty (30) days after all appeals are exhausted.

Appellant Wisehart now directly appeals and raises thirteen (13) issues for our consideration as follows:

1. involuntariness of Defendant's confessions;
2. refusal by the trial judge to permit individual voir dire of prospective jurors;
3. improper questioning of jury during voir dire;
4. refusal of trial judge to permit defendant to hire a private sociologist at public expense;
5. improper exclusion of expert testimony;
6. improper exclusion of cross-examination questions to investigating officers;
7. alleged refusal of the State to reveal an agreement with one of the State's witnesses;
8. violation of separation of witnesses order;
9. improper exclusion of newspaper articles submitted by Defendant;
10. alleged improper argument by the State during final argument;
11. alleged improper exclusion of certain testimony in the penalty phase of the trial;
12. sufficiency of the evidence; and
13. constitutionality and propriety of the death sentence.

The facts tend to show that at 10:30 p.m. on October 9, 1982, Anderson, Indiana police officer Wasilewski entered Apartment 304 at 29th and Brown Streets. The police had received a phone call informing them they would find the body of a woman at that location. Officer Wasilewski, receiving this information by radio dispatch, found the body of Marjorie Johnson at said apartment. Her clothing was torn and wrapped around her mid-section and her head beaten and bloody. A bloody butter knife was lying near her body and numerous stab wounds appeared on her body. What appeared to be her billfold, with the contents removed and scattered was found on the bathroom floor.

Marjorie Johnson had been a regular visitor at the Christian Center where Mark Wisehart resided. The director of the Christian Center said that on the morning after the murder he noticed Mike Wisehart look at the papers, go straight to the article about Marjorie Johnson's murder, read it, and return the paper. Another resident of the Center, also named Johnson, said that earlier Wisehart had sent a letter to Johnson, talking about going to old people's houses and robbing them. The letter was put into evidence and it concluded by saying defendant Wisehart would be armed and would kill if anyone got in his way. Johnson testified that he talked to Wisehart after Marjorie Johnson's murder and Wisehart, aware Johnson would be a witness, said to him, "Try to make it look like I'm crazy." (Record at 1118).

On October 15, Officer Tracy and Detective Brown went to the Christian Center to pick up Mark Wisehart. He was cooperative and agreed to go to the police station. Once there, he executed a written waiver of rights and gave statements to the police confessing to this crime. In his statements to the police he admitted stabbing Marjorie Johnson several times with several weapons, striking her with his fist and hitting her about the head with a whisky bottle. He also stated he went through her purse and took fourteen ($14.00) dollars. He admitted it was he who had tipped off the police, disguishing his voice in a high-pitched manner to sound like a woman. An autopsy performed by forensic pathologist John Pless indicated there were several severe blunt force injuries and fractures to Marjorie Johnson's head and thirteen stab wounds to her body. A photograph of her body shows cuts just at or below the left jawbone, stab wounds to the chest and one on the left shoulder. The fibroid cartilage commonly called the "Adam's apple" was fractured with hemorrhage and she also had broken ribs. The cause of death was determined to be multiple blunt force injury to the head and multiple stab wounds to the face and chest. The pathologist was not able to determine the time of death.

I

Appellant first claims the trial court erred in failing to grant his motion to suppress his confessions. His argument is based solely on the statement made by Detective Brown during the suppression hearing. At that hearing, Detective Brown stated: "I advised him by signing it [the waiver] he was not admitting or denying any guilt or giving up any rights." (Record at 505). Appellant contends this indicates he was fooled or tricked into thinking that signing of a rights waiver did not constitute the waiver of any rights and therefore was an improper solicitation of his confession. The record shows, however, that Appellant was fully advised of all of his Miranda rights prior to having given any confessions or statements to the police. The written advisements and waiver by the defendant show that all of the rights were given to him therein. Furthermore, in his taped confession, taken immediately thereafter, it is apparent Defendant was fully advised of all of his rights and he indicated he understood them. Detective Brown's statement did not purport to be a direct quotation of what he may have told Wisehart, but was only a paraphrase of the standard rights advisement, in particular stressing that Defendant could still terminate the interrogation and retain counsel. This is borne out by the beginning of the taped confession which is as follows:

"The date is Saturday. The date is Saturday, the 16th of October, 1982 at approximately 12:30 a.m. in the morning. Present are Detective Lloyd R. Brown, Anderson Police Department, Detective Randy Tracy, Anderson Police Department, and Mark Allen Wisehart, uh, a resident of the Christian Center here in Anderson.

"Q. Uh, Mark, you understand at this time you are under arrest for the murder and robbery of a Marjorie Johnson in the Brock Apartments; correct?

"A. (No audible answer)

"Q. Okay, do you understand that you have the right to remain silent?

"A. Yes.

"Q. Do you understand anything you say can be used against you in court?

"A. Yes.

"Q. Do you understand you have a right to consult with an attorney and have an attorney present?

"A Yes.

"Q. And do you also understand if you cannot afford a lawyer one will be appointed for you before any questions if you so desire?

"A. Mm hmm.

"Q. Okay, do you also understand that if you decide to answer questions now without a lawyer present you will still have the right to stop answering at any time?

"A. Yes.

"Q. And do you also understand you also have the right to stop answering at any time until you talk to a lawyer?

"A. Yes.

"Q. Okay, you've already given us...."

(Record at 635-636)

There is therefore no showing that the confession was extracted by any sort of threats or violence nor obtained by any direct or implied promises nor by the exertion of any improper influence. Rowe v. State, (1983) Ind., 444 N.E.2d

303; Hendricks v. State, (1978) 267 Ind. 496, 371 N.E.2d 1312, cert. denied 436 U.S. 961, 98 S.Ct. 3079, 57 L.Ed.2d 1127. The trial court accordingly committed no reversible error in denying the motion to suppress.

II

Appellant claims the trial court erred in denying his motion to individually voir dire each of the prospective jurors outside the presence of the others. This issue has already been decided by this Court adverse to Defendant's position in Burris v. State, (1984) Ind., 465 N.E.2d 171, cert. denied, 469 U.S. 1132, 105 S.Ct. 816, 83 L.Ed.2d 809, and Smith v. State, (1984) Ind., 465 N.E.2d 1105, reh. denied. Defendant points out no particular or actual prejudice in his case that distinguishes it from Smith and Burris. No reversible error is therefore presented on this issue.

III

The defendant asked this Court to rule that voir dire on the issue of the death penalty is not appropriate. He does not point to any particular questions asked of the jury in the instant case but generally claims that any voir dire referring to the death penalty is improper. Voir dire of a jury in a death penalty case has been approved by the United States Supreme Court, and the limitations set out on such voir dire, in Witherspoon v. Illinois, (1968) 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776. The United States Supreme Court spoke further on the subject in Adams v. Texas, (1980) 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 by deciding that the trial court may exclude a juror for cause if that juror is not willing to consider all of the penalties provided by State law and is irrevocably committed to vote against the death penalty prior to trial. This Court has exhaustively covered this subject adverse to Appellant's position, and followed Witherspoon, and Adams. Smith, supra; Burris, supra; Hoskins v. State, (1982) Ind., 441 N.E.2d 419; Lamar v. State, (1977) 266 Ind. 689, 366 N.E.2d 652, reh. denied; Monserrate v. State, (1971) 256 Ind. 623, 271 N.E.2d 420

(reversed and remanded based on Witherspoon).

Appellant further claims the trial court erred by failing to permit the jury to be informed during voir dire of the possible terms of years for the charged offenses other than the death penalty. Again, the trial court acted properly. Inasmuch as the jury in a felony case has no sentencing function it should not be informed as to the range of sentences possible. In a death penalty case, the jury has a limited function to recommend whether or not capital punishment is appropriate in its opinion and after having found the defendant guilty of murder. The trial court therefore did not err in providing that the jury would not be advised and questioned concerning the terms of years to which Defendant could be sentenced were he to be found guilty of any of the crimes with which he was charged. Burris, supra; State v. Williams, (1982) Ind., 430 N.E.2d 756; DeBose v. State, (1979) 270 Ind. 675, 389 N.E.2d 272.

IV

Prior to trial Defendant moved the court to authorize him to hire a psychiatrist, an investigator, and a sociologist, at public expense, to aid him in preparing his defense. The trial court granted Defendant's motion to hire a psychiatrist and an investigator, at public expense, but denied the motion to hire a sociologist. It is now Appellant's contention that the trial court erred in refusing this request.

It is well settled that an accused is not constitutionally entitled at public expense to any type of expert the accused desires to support his case. This matter is commended to the sound discretion of the trial court whose determination will not be overturned absent a showing of abuse of discretion. Thomas v. State, (1984) Ind., 459 N.E.2d 373; Craig v. State, (1983) Ind., 452 N.E.2d 921. Defendant fails to explain why a sociologist was necessary to prepare his defense. He makes the general statement that one was needed and that it was refused and therefore error. There is neither a showing as to why the sociologist was needed, nor

how Defendant was prejudiced by the judge's denial of Defendant's motion. We therefore find no abuse of discretion nor any error committed by the trial court in this regard.

V

Appellant contends the trial court erred in sustaining objections by the State to questions put by the defense to certain expert witnesses.

Mary Bradshaw testified for Defendant. She testified she was a treatment-diagnostics specialist at Crossroads Fort Wayne Children's Home, with a Master's Degree in pre-clinical psychology from St. Francis College. She worked with residents in individual and group therapy and applied psychological, personality and intelligence testing. She had seen Defendant in that capacity.

Witness Bradshaw testified at length about her observations of Defendant. She described him as a suspicious, paranoid and very troubled young man with bizarre thinking and some fantasies. She detailed some of his fantasies, including one involving a "buddy" from a place in outer space called "Nick's Plant." (Record at 1806-1807). She elaborated on his unusual behavior and termed him self-destructive. During the cross-examination she was asked to examine a diagnostic and statistical manual, which she commonly referred to in attempting to classify child patients. She was then asked under what category she would place Defendant. In other words, she was asked to tell the mental disease from which Defendant was suffering. She stated she could not technically diagnose. Consequently, the State objected to her answering the question on the grounds she was not qualified to diagnose due to her lack of training and her admission of not being qualified. The objection was sustained.

The trial court committed no error in sustaining this objection. It lies in the sound discretion of the trial court to

determine the competence of a witness to deliver an expert opinion on a subject. The trial court's determination is reviewed on appeal only for an abuse of that discretion. Hare v. State, (1984) Ind., 467 N.E.2d 7; Lawhorn v. State, (1983) Ind., 452 N.E.2d 915. Anyone who has observed a defendant is competent to testify, giving an opinion as to the observable conduct of that defendant that would indicate whether the person acted normally or might demonstrate mental incapacity to be legally responsible for his or her criminal acts. A lay person is qualified to do this and Mary Bradshaw did so here. However, the question excluded by the court was not this question. Mary Bradshaw was asked to diagnose the specific mental disease from which Defendant was suffering. By her own admission she was not competent to do this by lack of formal education and training. The answer, therefore, was properly excluded.

A similar question arose during the testimony of Kenneth L. Joy, director of a psychology clinic at Ball State University, teacher, and private practitioner involving work on custody matters and forensic psychology. He described forensic psychology as the application of psychology to the law. His credentials included a baccalaureate degree, a master's degree, and a doctorate. Further, he was doing post-doctoral work in law and was licensed by the Department of Public Instruction as a school psychologist. He testified that either a psychiatrist or a psychologist may render a diagnosis as to mental disease or defect. Further, he testified that he diagnosed defendant Wisehart as suffering from atypical psychosis involving a schizophrenic process, and detailed Defendant's symptoms.

During examination, the defense summarized the Indiana Statute giving the test to determine legal insanity and then asked Joy, "Would you say that someone who suffers from atypical psychosis or schizotypal personality would fit either of those standards?" (Record at 1878). The State objected to this question on the basis there was a lack of a showing of qualification of Dr. Joy as an expert regarding that question. The Court sustained this objection since Joy was not a

psychiatrist.

The State's contention is the trial court properly excluded the answer to the question since it in effect asked if all persons having a particular mental disorder are therefore criminally and legally insane. The State contends that no expert can testify that the existence of a particular mental disorder ipso facto renders persons legally insane, citing Taylor v. State, (1982) Ind., 440 N.E.2d 1109. We fail to see reversible error in this ruling by the Court. Witness Joy was able to testify at length about his observations and diagnosis of the defendant. He was never asked, however, whether the mental disease or defect he actually diagnosed prevented Wisehart from understanding the difference between right and wrong or rendered Wisehart incapable of conforming his actions to the requirements of the law. This, of course, was the proper question to ask the witness and he would have been qualified to answer it. It cannot be said the trial court excluded this proper testimony by his ruling on the State's objection. The excluded question was not directed to the ultimate question of Wisehart's insanity defense and did not preclude the witness from testifying as to the ultimate question concerning Defendant's insanity due to his particular mental disorder. Therefore, there is no error presented on this issue.

VI

The trial court excluded certain testimony by witness Kenneth Joy and investigating officer Moberly during the penalty phase of the trial. These questions related to involvement of other persons in this crime. The State maintains the offered testimony was speculative, merely repetitive and self-serving hearsay. Appellant has cited no authority whatever in his argument on this issue but since this is a capital case, we will not find waiver pursuant to Ind. R. App. P. 8.3(A)(7) but will review the propriety of the Court's rulings.

Officer Moberly was called by the defendant during the

penalty phase to give his opinion as to whether Wisehart acted alone in the case. Officers Moberly and Brown had testified on this subject during the guilt phase of the trial and the court had granted the State's motion to incorporate all evidence of the guilt phase into the penalty phase. Officer Brown had testified during the guilt phase that he felt there was a possibility there were other people involved. Officer Moberly had testified that the defendant had told him he acted alone, but Moberly still felt there could have been someone present at Marjorie Johnson's door who left before the incident took place. Moberly said he had no evidence whatever to support this testimony. This Court held in Smith v. State, (1981) 420 N.E.2d 1225, it was proper to exclude the question and answer of a prosecutorial official's opinion as to whether that particular defendant was acting under the influence of another. Moberly had already testified he had no evidence to indicate anyone else was present during this incident but only thought it was possible someone else came to the door with the defendant. Since he already had testified to this before the jury in the guilt phase of the trial it is difficult to discern any prejudice to the defendant by its exclusion during the penalty phase.

The defense also offered testimony of witness Joy that defendant Wisehart had told him two other persons were involved and Defendant stood by while those two other persons killed Mrs. Johnson. The trial court found that the repetition of this alleged statement of Defendant through witness Joy would be self-serving hearsay enabling Defendant to enhance his credibility by this impermissible method. Marts v. State, (1982) Ind., 432 N.E.2d 18, 24. There was no credible evidence of the involvement of any other person in this incident and Defendant had told no one else including the investigating officers that anyone had accompanied him. In view of all the evidence presented to the jury in this cause and all of the surrounding circumstances, we cannot say the trial court abused its discretion to the extent that reversible error is presented.

VII

Defendant contends that the State connived in the presentation of testimony of witness Scott Johnson of perjured testimony wherein Johnson denied the existence of any agreement with the State regarding charges against Johnson himself in exchange for his testimony against Defendant in this cause. Johnson was a former friend of Wisehart and testified Wisehart had written many letters to Johnson speaking of his intention to rob old people and kill them if necessary. Wisehart had asked Johnson to testify in such a manner that it would help establish that Wisehart was insane.

Appellant does not present any evidence supporting the claim of an agreement or bargain with the State. He claims only that since there is some implication that Johnson himself was involved in a church burglary or break-in, that there is strong circumstantial evidence that an agreement must have existed. Therefore, the witness perjured himself in stating there was no such agreement and the State knowingly allowed Johnson to do so. We find this to be a totally irresponsible charge presenting an issue totally lacking in merit.

No evidence in support of this claim is presented. We have only Defendant's supposition that it may or could be so. This presents no issue for review.

VIII

Appellant claims it was a violation of the Separation of Witnesses Order to allow Officer Moberly to sit at the State's counsel table during trial and allow him to testify over Defendant's objection. Pursuant to the Separation of Witnesses Order the State chose to have Officer Moberly stay at the counsel's table during the course of the trial. Appellant cites no authority for his claim that the procedure was improper. It is settled law, however, that the matter of separation of witnesses is left to the trial court's discretion

and it further is accepted procedure to have a party choose one person to stay at counsel's table to aid counsel during the trial even though that person is a witness who will later testify. The State has this right as well as any other party and may choose a police officer even though he is also a witness. Gee v. State, (1979) 271 Ind. 28, 389 N.E.2d 303.

IX

During the guilt phase of the trial Defendant offered into evidence a number of newspaper articles in an attempt to show that all the facts of his confession could have been learned from reading them. This was to support his position that perhaps due to his mental illness he confessed to a crime he did not commit and about which he might have learned from reading the newspapers. The trial court did admit into evidence two newspaper articles presented as Exhibits 2, 2A and 7, which Defendant was known to have read. The trial court excluded, however, other newspaper articles since there was no showing that Defendant had ever read or seen them. There was no showing or contention that Defendant had, in fact, read any of the articles offered and excluded, but only the claim that he might have seen them since they existed and he might have or could have gotten the information from them about the details of the crime that he used in his confession.

An evidentiary ruling is reviewed only for an abuse of discretion. Hare v. State, supra. This Court will reverse a judgment only where such an error has caused prejudice to the defendant. Springer v. State, (1984) Ind., 463 N.E.2d 243. Again Appellant offers no authority in support of his contention that all of these articles should have been put into evidence. It appears the trial court reviewed these exhibits and permitted into evidence those that were shown to be relevant and excluded those that were not. We see no abuse of discretion that would justify a finding of reversible error.

X

During final argument in the penalty phase of the trial the prosecutor stated the maximum term Defendant could get, other than the death penalty, was sixty (60) years. No objection was made to this statement at the trial nor does Defendant object at this time that it was improper for the State during penalty phase to remark as to possible penalties. The only argument Appellant makes now is that the statement of the State was inaccurate in that it was possible Defendant could have received consecutive sentences for murder, burglary, and robbery. The State points out, however, that the murder charge was a felony murder charge with the underlying felonies being robbery and burglary. It is settled law that a defendant could not receive separate sentences on both a felony murder and the underlying felonies. Burris v. State, (1984) Ind., 465 N.E.2d 171, reh. denied. Therefore, no reversible error is presented on this issue.

XI

During the penalty phase of the trial, Defendant attempted to submit the personal opinions of Dr. Clear and Reverend Trevathan on society's use of capital punishment. They would have testified about religious and societal issues involved in the use of the death penalty. Defendant was allowed to argue such considerations to the jury but the trial court found the testimony of these witnesses improper evidence since it concerned only private opinions about the death penalty. We agree. The question of whether or not it is appropriate in our society to provide for the death penalty in certain cases is one to be answered by the legislature. The issue to be decided by a trial jury is whether the sentence is appropriate for the particular offense and the particular offender. Gregg v. Georgia, (1976) 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859, reh. denied.

Appellant cites Lockett v. Ohio, (1978) 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 for the proposition that the

proper evidence should have been admitted since sentencing decisions should not be made in a vacuum. In Lockett, the Supreme Court of the United States was referring to relevant facts regarding the offense committed and the character of the offender, which was excluded by Ohio's law restricting the mitigating circumstances which were allowed to be considered. Lockett referred to evidence directly on point regarding the defendant and a particular crime at issue before the jury. The testimony proposed by Defendant in the instant case through the two witnesses was not evidence of the type presented in Lockett, but represented only general philosophical opinions regarding penalties approved by our State Legislature. The jury was fully informed of its options and its duty to recommend against the death penalty if proof of an aggravating circumstance was lacking or there was a finding that mitigating circumstances were not outweighed by the aggravating ones pursuant to Ind.Code § 35-50-2-9 (Burns Supp.1983). The trial court did not abuse its discretion by excluding the testimony of these two witnesses.

XII

It is Defendant's contention there was insufficient evidence before the jury to support the conviction. Our review is to determine whether there was sufficient evidence of probative value from which the factfinder could make its findings beyond a reasonable doubt. If there is such evidence of probative value to support the conclusion of the jury we would not be inclined to overturn the conviction of the jury. Smith v. State, (1984) Ind., 465 N.E.2d 1105, reh. denied.

Defendant's argument is not that there was a lack of evidence before the jury but is an attack upon the credibility of that evidence. He attempts to point out inconsistencies in his confession which he claims shows his confession were not accurate recounts of what happened but were recitations of what he had heard elsewhere, indicating an insane and disabled mental condition. One instance of such discrepancy he points out is that in his confession he stated he stabbed

Mrs. Johnson in the neck. The pathologist's statement said there were no wounds to her throat. Photos of her body, however, show that there was at least one stab wound below the cheekbone, very close to the neck area. There actually were stab wounds about the face and many other parts of the body to a great extent. He also refers to time discrepancies in testimony of witnesses and minor inconsistencies in some of the details. The jury had before it all of this evidence including the discrepancies now pointed out by the defendant. They also saw his confession, including the presentation of it through audio and videotape. The jury had more than ample facts before it on which to make the finding they did and we have no grounds to set aside that judgment merely on the basis of the credibility of such evidence.

XIII

Finally, Appellant claims the death penalty statute in Indiana is unconstitutional and inappropriate in this case. He contends the death penalty is unconstitutional based on allegations of a lack of a proportionality review, the undue discretion given to prosecutors to decide whether or not the death penalty will be sought and the possibility of a mistake. His contentions have been considered adverse to Appellant's position in Smith v. State, (1984) Ind., 465 N.E.2d 1105, reh. denied; Resnover v. State, (1984) Ind., 460 N.E.2d 922, cert. denied, 469 U.S. 873, 105 S.Ct. 231, 83 L.Ed.2d 160, and Schiro v. State, (1983) Ind., 451 N.E.2d 1047, cert. denied, 464 U.S. 1003, 104 S.Ct. 510, 78 L.Ed.2d 699. The procedures adopted in Indiana adequately meet the severe requirements of the United States Supreme Court to guard against the arbitrary and capricious or freakish application of the death penalty. Gregg, supra; Pulley v. Harris, (1984) 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29.

The jury recommended the death penalty to the trial judge and he made lengthy findings in sentencing Defendant. The trial judge indicated he had thoroughly examined the recommendation of the jury, the pre-sentence report filed in the case and the briefs and arguments by the parties. The

trial judge then found that the State had proved beyond a reasonable doubt that Defendant Wisehart was guilty of four criminal counts: namely, murder, robbery, burglary, and theft. He further found beyond a reasonable doubt Defendant intentionally killed the victim while committing the crimes of robbery and burglary as charged. He then considered the aggravating and mitigating circumstances required by Ind. Code § 35-50-2-9(b). He found as an aggravating circumstance, proved beyond a reasonable doubt, that Mark Alan Wisehart committed murder by intentionally killing the victim while committing burglary and robbery. He then considered each mitigating circumstance outlined in Ind.Code § 35-50-2-9(c) and found there were no mitigating circumstances in this case to mitigate the aggravating feature set out above. He found the defendant did have a significant history of prior criminal conduct for which he had been incarcerated several times. The trial judge further found that Wisehart had no remorse or intention to correct those criminal propensities and, in fact, found that Defendant demonstrated an intention to continue his criminal activities, killing his victims if necessary as evidenced by letters entered into evidence and other testimony. The trial judge proceeded to find there was some evidence the defendant had had occasional emotional problems in his life but there was no evidence he was under influence of extreme mental or emotional disturbance when he committed this murder. He found the victim did not participate in or consent to any of Defendant's conduct, nor was there any evidence that Defendant was an accomplice in the murder committed by another person with Defendant's participation being relatively minor. He referred to the fact that there was testimony of a possibility that there may have been another person or persons present but found there was no proof of any other person's participation and regardless of that possibility the defendant's participation in the event was major and resulted in intentional killing of the victim. He also found there was no evidence Defendant acted under the substantial domination of another person. He found there was no mitigation as to Defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the

requirements of the law because of mental disease or defect, or intoxication. He referred to the fact that several witnesses testified the defendant was sane. The jury had the benefit of two psychiatrists and other witnesses regarding this issue. He then found that although Defendant's youth might have been a mitigating factor, Defendant had led a life of crime and been incarcerated in several institutions. He then found that the actions and attitude of the defendant showed prior criminal conduct and conduct presently showing a criminal personality totally devoid of a compulsion for legal behavior. "His very thought processes are bent on evil and the accomplishment of misdeeds and malevolent behavior." (Record at 2455). He found that even though young in years, the defendant was quite mature in the ways of conducting criminal activity. In reviewing the trial judge's findings and conclusions, we find they are well supported by the evidence. Accordingly, we do not find the death penalty inappropriate in this case based on the crime, the manner in which it was committed, and the character of the perpetrator. We therefore affirm the trial court in all things, including its imposition of the death penalty.

This cause is remanded to the trial court for the purpose of setting a date for the death sentence to be carried out.

Givan, C.J., Prentice, and Shepard, JJ., concur.
DeBruler, J., dissents with separate opinion.

IN THE

SUPREME COURT OF INDIANA

MARK ALLEN WISEHART,)
)
Appellant,)
)
v.) No. 384 S 89
)
STATE OF INDIANA,)
)
Appellee)

APPEAL FROM THE MADISON SUPERIOR COURT DIVISION III
The Honorable Thomas Newman, Jr., Judge

DeBRULER, J. - Dissenting

The record facts material to the suppression issue presented in this appeal are as follows: Appellant Wisehart was living in the Christian Center, just around the corner from the Anderson Police Department. Detective Lloyd Brown and another officer went there and picked up appellant for questioning. Within a room in the police station, at 6:00 P.M. on October 15, 1982, the following took place according to Brown's testimony.

A I have a procedure that I use when I advise anyone of their rights. I, uh, read, uh, the rights waiver in a question form.

* * *

Q And can you tell us what you did as far as this particular exhibit was concerned before you saw Mark Wisehart sign it?

A Yes, I advised him that before we ask him any questions I had to make sure that he understood his rights. Then I asked him quote, I said, "Do you understand that you

have the right to remain silent," and he answered that he did. Uh, asked him then, "Do you understand anything you say can be used against you in a court," and I again waited for a verbal reply of yes. Uh, I then asked him, "Do you understand that you have the right to consult with an attorney and have an attorney present," and he again verbally said yes. I then asked him, uh, "Do you understand if you cannot afford a lawyer one will be appointed for you before any questioning if you so desire?" He again said yes. I then asked him, "Do you understand that if you decide to answer questions now without a lawyer present you will still have the right to stop answering at any time and do you also understand that you also have the right to stop answering at any time until you talk to a lawyer?" He again said yes. I then asked him to read this himself, uh, and if he would sign it at the bottom. Uh, I advised him by signing it he was not admitting or denying any guilt or giving up any rights. I explained to him that his signature was acknowledging that I had read his rights to him, that he understood them and that he had read them himself.

Q Okay, and the waiver on the bottom, uh, did you read that to him or did he read it to your knowledge?

A Uh, he gave me the indication that he read it himself. I did not read it to him.

Q Okay. And did he ... After reading this did he sign it at that time?

A Yes, he did in ... in my presence.

The form signed is the following:

ANDERSON POLICE DEPARTMENT
ADVICE OF RIGHTS
YOUR RIGHTS

Before we ask you any questions, you must

understand your rights. You have the right to remain silent.

Anything you say can be used against you in a Court.

You have the right to consult with an Attorney and to have an attorney present.

If you cannot afford a lawyer, one will be appointed for you before any questioning, if you so desire.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to answer questions and/or make a statement. I do not want a lawyer at this time. I understand, and know what I am doing. No promises or threats have been made to me and no presure or coercion of any kind has been applied to me and I am acting voluntarily and of my own free will.

Appellant was interrogated until about 10:00 P.M., when he went to another place in the police station for a polygraph examination. Officer Fancher who gave the test testified as follows regarding the second advisement and waiver.

Q What did you do?

A I filled out the top portion. It was given to Mark Wisehart for him to read, which time he read it. I asked him if he understood his rights. He said, yes, he did. I give it to him to sign. He signed it. I witnessed it.

Q Okay, you witnessed it. And after that what took place,

after he signed this particular exhibit?

A I interviewed him.

The form referred by Fancher is identical to the one used at 6:00 P.M. by Brown which is set out in full above in this dissenting opinion.

Fancher was permitted at trial to testify that appellant admitted killing the victim during his interview. This was appellant's first admission of guilt, and it was admitted against him at trial over a continuing objection.

Brown testified as to the events then next occurring. Fancher called him, and he went to where appellant had been interviewed by Fancher. Brown's testimony continued

A Okay. Uh, when I first saw him he had ... he, uh, was crying slightly. He had a couple of tears running down his cheeks.

Q Okay, and is that all that you noticed about him at that time?

A Uh, at that time he was kind of slouched down in a chair and when I came in he again recognized me and I asked him if it would be okay if Sergeant Moberly would also be present. He said that was fine and by about that time he had quit crying and, uh, he was getting back to his normal self that I'd ... like I'd seen him before.

Q Did he make any further statements to you at that time:

A Yes, he did.

Q What statements did he make?

A Uh, he admitted that he had killed Marjorie Johnson.

A Okay. Could you relate as best you can what ... what he

said and what you folks said, you and Sergeant Moberly?

A Uh, we asked him if we could talk to him at this time to get a statement from him while we were still in this same area and he said it was alright; that he wanted to talk. He told me that ... first of all that he was sorry that he lied to me when I talked to him earlier in the evening and he also wanted me to convey to Detective Tracy, uh, to tell him that he was sorry for lying to him also. Uh, we then started asking him how this murder had come about. He at that time started to tell us that he'd been at the Christian Center in the afternoon and that he had decided two weeks prior that he was going to kill Marjorie Johnson. Brown then went on to testify over the continuing defense objection, to a forty-five minute dialogue during which appellant described his crime in great detail, and to a description of events in the interrogation room during the dialogue. It may be noted, that this forty-five minute dialogue between appellant and Brown resulted in the second oral confession, the first having been made to Fancher, and was itself not preceded by new warnings, over and above those previously given by Brown at 6:00 P.M. and those given by Fancher at about 10:00 P.M., and by waivers, over and above those purportedly given by appellant at 6:00 P.M. and 10:00 P.M.

Detective Brown, after concluding his testimony about the detailed oral confession, testified to what happened next.

Q And then what took place?

A We asked Mark if he would accompany us back to the police station, uh, back to the library and give us a ... a signed ... a written statement which consisted of it being typed as he dictated it and then he could read it and sign it if he felt that it was true and accurate. And he did say that this was fine; he would do this.

Q In the conversation that you had with him that took half

an hour to forty-five minutes what was his demeanor during that time?

A Uh, it was calm. Uh, he wasn't upset, uh, to the fact that he was nervous. Uh, and one thing that ... that particulary struck me is while he was smoking a cigarette sometimes he would blow a smoke ring.

Q Now the statement, the written statement what area was that taken?

A Uh, that ... What area of the police department:

Q Yes, police department.

A That was ... that was taken in the same library that the original interview had started in.

Q Can you tell us what happened ... Uh, well, did anything happen just prior to taking that statement?

A Uh, he was again advised of his right. Uh, they were read aloud to him by Lieutenant Moberly as they are stated on the statement form and he was asked if he understood his rights and he stated that he did. Uh, at this time he was asked to dictate in his own words and by the notes that we had taken earlier if he would give us another statement and he did and ... or he said that he would and he did.

Q This is in typewritten form; is that correct?

A Yes, it is.

Q And who typed?

A Uh, Sergeant Moberly if I remember correctly is the one that actually typed it himself.

Q Can you, please, just relate how ... just how it took place

that ..., you know, how the ... were there questions asked?

A There were questions asked of him. Uh, he related ... he gave answers to the questions and also the questions some of them were, uh, based on the notes that had been taken earlier by Lieutenant Moberly when we were taking the oral statement. And then as the statement was typed some additional questions about details were asked of Mark and he answered them.

The above recital provides the totality of material upon which the suppression issues must be resolved. From this material, one must conclude that those events, including warnings and purported waivers occurring after appellant's first complete admission of guilt to officer Fancher during the polygraph interview, are irrelevant and must be disregarded. It is the warnings and purported waivers occurring prior to that interview which are relevant, and it is upon their sufficiency which the admission of the Fancher confession of guilt and all subsequent confessions and evidence stemming therefrom depend, as a matter of legal principle. We are left therefore with the conduct of appellant in signing the identical waiver forms at 6:00 and 10:00 P.M., and Detective Brown's statement accompanying the first signing in which he orally advised appellant "I advised him by signing it [the waiver] he was not admitting or denying any guilt or giving up any rights." (record at 505). It is from these three elements, taken within the circumstances, upon which this court must decide whether the trial court was warranted in concluding beyond a reasonable doubt that appellant knowingly, intelligently and voluntarily relinquished the privilege against self-incrimination. Miranda v. Arizona (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. Edwards v. State (1980), 274 Ind. 387, 412 N.E.2d 223.

In determining whether a valid waiver of Miranda rights has occurred, we look to the circumstances surrounding its giving to determine whether it was "induced by any

violence, threats, promises, or other improper influence." Montes v. State (1975), 263 Ind. 390, 332 N.E.2d 786, 792. The burden is on the State to prove beyond a reasonable doubt the knowing and voluntary character of the waiver. Burton v. State (1973), 260 Ind. 94, 292 N.E.2d 790. Furthermore, the signing of a waiver form does not conclusively show a valid waiver. Dickerson v. State (1972), 257 Ind. 562, 276 N.E.2d 845. Here, the waiver section of the form was not read to appellant, but he was asked to read that part for himself. This is true as to both written waivers. Thus there was no aid or assistance provided appellant in understanding that section, by either interrogator. Indeed the first reading by appellant was accompanied by an explanation by the interrogator which was contrary to the actual legal consequence of signing, namely that by signing he was not giving up any right. The further point needs to be made here, that the waiver section of the form is obscure in the manner in which it approaches waiver. The form does not specifically inform the reader that a choice to give up or relinquish something is at stake. A lawyer might perceive an inference that a "giving up" or "relinquishing" was occurring, but it would be difficult for a person untrained in this area to do so. This obscurity existed in both waiver sections, and since only four hours separated the two acts of signing them, the enhancement of the obscurity flowing from Detective Brown's direct statement that appellant was not giving up any rights by signing, impacted both. This does not comport with the requirements of the federal constitution governing waivers of constitutional rights. I would therefore reverse this conviction for a new suppression hearing to establish what evidence was acquired by the State by reason of this constitutional violation, and a new trial at which appellant's admissions of guilt and any additional evidence acquired by the state by exploiting those admissions, are excluded.

UNITED STATES COURT OF APPEALS
for the Seventh Circuit
Chicago, Illinois 60604

June 24, 2005

Before

Hon. Joel M. Flaum, *Chief Judge*

Hon. Richard A. Posner, *Circuit Judge*

Hon. Diane P. Wood, *Circuit Judge*

No. 04-1632

MARK WISEHART, Petitioner-Appellant,	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
v.	
CECIL DAVIS, Superintendent, Respondent-Appellee.	No. 98 C1027 Larry J. McKinney, *Chief Judge*.

ORDER

On June 7, 2005, respondent-appellee filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore DENIED.

STATE OF INDIANA	)	IN THE SUPERIOR COURT III OF
	) SS:	MADISON COUNTY
COUNTY OF MADISON	)	CAUSE NO. 3SCR-82-204

MARK ALLEN WISEHART)
Petitioner,)
)
v.)
)
STATE OF INDIANA,)
Respondent.)

Affidavit of Marlene Burns

COMES NOW, the affiant, Marlene Burns, and on her oath deposes and states as follows:

1. My name is Marlene Burns and I am 56 years old. I currently reside at 1801 North B Street in Elwood, Indiana. I am a teacher for the Tipton Community Schools.

2. In August of 1983, I was a member of the jury in the ***State of Indiana v. Mark Wisehart***, Cause No. 3SCR-82-204.

3. During Mark Wisehart's trial, I learned that Mark Wisehart had taken a polygraph test. The jury had been brought to the courthouse, and was preparing to begin court when we were told court whould not be held that day. I learned the court session had been cancelled because Mark Wisehart was to take a polygraph test. I do not recall who gave me the information about the polygraph. After the polygraph, the trial continue, and I never learned the results of Mark Wisehart's polygraph test.

[Exhibit Stamp]
PETITIONER'S
EXHIBIT
O
4-22-94

FURTHER AFFIANT SAYETH NOT.

/s/ Marlene Burns
Marlene Burns, Affiant

STATE OF INDIANA)
)SS:
COUNTY OF MADISON)

Subscribed and sworn to before me, a Notary Public, this 31 day of January, 1994.

/s/ Michael E. Dennis
Notary Public

Michael E. Dennis
Printed Name

My Commission Expires:
Dec 15, 1996

County of Residence:
Marion

INSTRUCTION NO. 5A -- EVIDENCE

You shall be impartial and weigh the evidence in an endeavor to do justice to the State and to the defendant. You shall consider only the evidence that has been introduced in the case. You should disregard any and all information that you may derive from any other source. If any reference by the Court or the attorneys to matters of evidence does not coincide with your own recollection of the evidence, it is your recollection which should control during your deliberations. Statements and arguments of the attorneys are not evidence. Their statements and arguments are only intended to assist you in the understanding of the evidence and the contentions of the parties. The questions, statements and arguments of the attorneys relating to the admission of evidence were for the consideration of the Court and were for the purpose of aiding the Court in determining the admissibility of evidence.

In considering the evidence in this cause, you are permitted to draw reasonable inferences from the facts proved. A reasonable inference is one which naturally flows from the facts proved. You are not, however, permitted to draw an inference based solely upon another inference. If, after careful consideration of all the evidence in this case, you are left with two different theories, one consistent with the defendant's innocence and the other with his guilt, both reasonable, and you are not able to choose between the two, you must find the defendant not guilty.

FINAL INSTRUCTIONS 44

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FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-668

IN THE

Supreme Court of the United States

ED BUSS, in his official capacity as
Superintendent of the Indiana State Prison,
Petitioner,

v.

MARK ALLEN WISEHART,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY IN SUPPORT OF THE PETITION

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6201

**Counsel of Record*

STEVE CARTER
Attorney General
THOMAS M. FISHER*
Solicitor General
STEPHEN R. CREASON
Section Chief
JULIE A. HOFFMAN
Deputy Attorney General
Counsel for Petitioner

CAPITAL CASE

QUESTIONS PRESENTED

1. In jury bias claims, does the Sixth Amendment require a presumption of prejudice that the prosecution must disprove?

2. If so, was this rule "clearly established" by this Court for habeas corpus purposes in light of *Smith v. Phillips*, 455 U.S. 209 (1982), *United States v. Olano*, 507 U.S. 725 (1993), and a well-established circuit conflict over the rule?

REPLY IN SUPPORT OF THE PETITION

1. Contrary to Respondent's assertion, the decision below did not merely find that a "judicial inquiry" into Respondent's jury bias allegation was necessary. Rather, the Seventh Circuit squarely held that *Remmer v. United States*, 347 U.S. 227, 229 (1954), requires the government to disprove prejudice whenever a criminal defendant claims that a juror learned information extraneous to the trial. Pet. App. 9a ("But it was the state's burden, given the juror's affidavit, to present evidence that the jury's deliberations had not been poisoned by the reference to Wisehart's having been given a polygraph test"). This holding accords with two other circuits, but has been rejected by the rest. Most circuits follow the lead of *Smith v. Phillips*, 455 U.S. 209 (1982), and *United States v. Olano*, 507 U.S. 725 (1993), and require defendants to establish actual prejudice resulting from the alleged taint. Pet. 8-9.

Accordingly, the issue here concerns the presumption of prejudice and the resulting burden on the government in jury bias claims, *not* merely the need for a judge to hear the claim. Yet Respondent attempts to harmonize the undeniable circuit conflict over this issue by reference to the "judicial inquiry" that invariably occurs in response to jury bias claims, as if no such inquiry had happened in state court in this case. The Seventh Circuit, however, expressly recognized that the Indiana courts had already conducted such an inquiry. Pet. App. 6a. Respondent cannot seriously be understood to argue that a hearing is the only requirement, for, if so, then habeas relief is wholly improper on the procedural history recognized by the Seventh Circuit itself.

Eight circuits (nine, if the internally conflicted Eleventh Circuit is included) have held that it is improper to do what the Seventh Circuit did here and presume prejudice in jury bias claims. *See* Pet. 8-9. The substantial, deep and

important conflict among the nation's courts over this question necessitates this Court's review.

2. Respondent largely concedes that a circuit conflict exists with respect to the allocation of evidentiary burdens in jury bias claims. Opp. 5. He argues that certiorari is not warranted here, however, because "the facts in this case have yet to be developed." *Id.* But the whole issue presented is whether any other facts *need* to be developed. Respondent simply ignores that he has already had one hearing of his claim and that the dispute at this point is whether he should get a new hearing where the State bears the burden of proof.

Again, an Indiana court conducted a jury-bias inquiry at the post-conviction review hearing, when the bias allegation first was raised. At that hearing, Respondent submitted Juror Burns's affidavit and nothing else.[1] Pet. App. 155a-156a. The court denied relief, and the Indiana Supreme Court affirmed, finding that Respondent had failed to meet his burden of showing a "likelihood that the verdict was affected." Pet. App. 124a-125a. On habeas review, the district court concurred that no evidence at the post-conviction hearing supported a finding of prejudice. Pet. App. 37a-39a. The Seventh Circuit reversed because, it says, the burden is the State's, not Respondent's. Pet. App. 9a. It did not order a new trial directly because the presumption of prejudice is rebuttable, not conclusive. *Id.*

On this record, the need for further state court proceedings turns entirely on whether the State should indeed bear the burden to rebut a presumption of prejudice. As such, this case is an ideal vehicle for addressing the vast

---

[1] Respondent now claims that two other jurors learned of the polygraph examination. There is no support for this assertion in the record, and Respondent's state court claim and evidence was limited to Juror Burns. (Pet. App. 155a-156a).

confusion among the lower courts in this area. Unless this conflict is resolved, Indiana will be required to shoulder a presumption of jury-bias prejudice not shared by the majority of states.[2]

3. Finally, adhering to the conceit that this case implicates no circuit conflicts, Respondent completely fails to address how a rule can be "clearly established" under Section 2254(d) when profound disagreement exists over its proper application. In this regard, however, five circuits have explicitly held that a rule is not "clearly established" for Section 2254(d) purposes where significant national disagreement over the rule exists. *See* Pet. 12-14. Supreme Court precedents suggest the same. *See Kane v. Espitia*, 546 U.S. __, 126 S. Ct. 407, 408 (2005) (per curiam); *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003); *Mitchell v. Esparza*, 540 U.S. 12, 17-19 (2003) (per curiam). The Court should grant the petition and either summarily reverse or undertake plenary review of this question as well.

---

[2] Respondent also assumes that Indiana law permits the reopening of post-conviction review proceedings, but it has never been attempted to Petitioner's knowledge. If this petition is denied, Respondent may have to be released or retried.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below should be reversed.

Respectfully submitted.

STEVE CARTER
Attorney General
THOMAS M. FISHER*
Solicitor General
STEPHEN R. CREASON
Section Chief
JULIE A. HOFFMAN
Deputy Attorney General

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6201

**Counsel of Record*

Counsel for Petitioner

Dated: March 3, 2006